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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

No. 79-6624

HUMBERTO ROSALES-LOPEZ,

PETITIONER,

v.

UNITED STATES OF AMERICA,

RESPONDENT.

MOTION FOR LEAVE TO
PROCEED
IN FORMA PAUPERIS

Pursuant to 18 U.S.C. § 3006A(d)(6) and Rule 53 of this Court, the Petitioner, Humberto Rosales-Lopez, asks leave to file the attached Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit without prepayment of fees or costs and to proceed in forma pauperis. The Petitioner was represented by counsel appointed pursuant to 18 U.S.C. § 3006A in the district court and on appeal to the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

DATED: 16 May 1980

John J. Cleary

JOHN J. CLEARY
Federal Defenders of San Diego, Inc.
225 Broadway, Suite 855
San Diego, California 92101
Telephone: 714-234-8467
FTS 895-5240

Attorneys for Petitioner

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOHN J. CLEARY
Federal Defenders of San Diego, Inc.
225 Broadway, Suite 855
San Diego, California 92101
Telephone: 714-234-8467
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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner, Humberto Rosales-Lopez, requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit in United States of America v. Humberto Rosales-Lopez, C.A. No. 79-1302, entered on 20 March 1980.

OPINION BELOW

On 20 March 1980 the court of appeals filed and entered its opinion affirming the conviction of the Petitioner. A copy of the opinion (not yet published) is attached as Appendix A. A petition for rehearing was denied on 12 May 1980 (a copy attached as Appendix B).

JURISDICTION

On 20 March 1980 the court of appeals entered judgment affirming the conviction of the Petitioner for conspiracy and illegal transportation of aliens (18 U.S.C. § 371 and 8 U.S.C. § 1324). The petition for rehearing was denied on 12

May 1980. Jurisdiction to review the judgment of the court of appeals is conferred upon this Court by Title 28, United States Code, Section 1254(1).

QUESTIONS PRESENTED FOR REVIEW

I. Was the trial court's refusal to ask during voir dire a question concerning race when a Mexican was charged with an immigration offense a denial of constitutional due process or serious error for a federal trial court?

II. Was it error for the judge who presided at a complex alien smuggling jury trial and later sentenced a co-defendant to refuse to sentence the Petitioner as soon as possible as requested for the convenience of the probation department and to permit sentencing over objection by a different judge who had not reviewed the transcript of trial?

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution:

> Amendment V: No person shall be . . . deprived of life, liberty, or property without due process of law . . . .
>
> Amendment VI: In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . .

STATEMENT OF THE CASE

For the purposes of this petition, an adequate summary of the facts material to the consideration of the questions presented is contained in the opinion of the court of appeals (Appendix A).

REASONS FOR GRANTING THE WRIT

> Solon believed that laws were like cobwebbs--if any trifling or powerless thing fell into them, they held it fast, while if it were something weightier, it broke through the cobweb and was off.
>
> Diogenes Laertius
> (3d Century, A.D.)

I. The inadequate voir dire by the trial court refusing to ask a question concerning race when a Mexican was charged with an immigration offense is a clear break with established precedent for the federal courts.

The defense, prior to trial, filed a written request that defense counsel be permitted to personally voir dire the prospective members of the jury with a limitation of not more than 30 minutes so as to make reasonable inquiry. That request was denied, and the district court conducted a brief and cursory questioning of the prospective jurors. [R.T. 141-151] The court refused to ask the six particular questions that counsel requested after the court had conducted this general questioning. Those six questions are set forth in the opinion of the court of appeals (Appendix A, footnotes 1 and 2). One of the questions the court refused to ask was:

> Would you consider the race or Mexican descent of Humberto Rosales-Lopez in your evaluation of this case? How would it affect you?

(Appendix A, footnote 2).

Although federal law does give the trial judge great discretion in the extent of voir dire, it has been crystal clear since 1976 in federal cases that proposed questions concerning racial prejudice must be asked. In Aldridge v. United States, 283 U.S. 308 (1931), Chief Justice Hughes in writing for the Court stated:

> The argument is advanced on behalf of the [G]overnment that it would be detrimental to the administration of the law in the courts of the United States to allow questions to jurors as to racial or religious prejudices. We think that it would be far more injurious to permit it to be thought that persons entertaining a disqualifying prejudice were allowed to serve as jurors and the inquiries designed to elicit the fact of disqualification were barred. No surer way could be devised to bring the processes of justice into disrepute.

283 U.S. 308, 314-15.

In the context of a state case, Justice Powell in Ristaino v. Ross, 424 U.S. 589 (1976), rearticulated the requirements for federal courts:

> Although we hold that voir dire questioning directed to racial prejudice was not constitutionally required, the wiser course generally is to propound appropriate questions designed to identify racial prejudice if requested by the defendant. Under our supervisory power we would have required as much of a federal court faced with the circumstances here. See Aldridge v. United States, supra; cf. United States v. Walker, 491 F.2d 236 (C.A. 9), cert. denied, 416 U.S. 990 (1974); United States v. Booker, 480 F.2d 1310 (C.A. 7 1973).

424 U.S. 589, 597, n.9.1/

The Ninth Circuit Walker decision, mentioned above, involved a black defendant charged with forgery of United States Treasury checks, and two of the Government's chief witnesses as well as three of the jurors were black. In the context of the case, the court found no abuse of the broad discretion of the trial judge. In the Seventh Circuit Booker decision, Justice Stevens (then circuit judge) in writing for the unanimous court that reversed the conviction of a black defendant even though there were five black persons on the jury stated:

> In Aldridge, as here, the error was committed in a federal court. For that reason reversal need not rest on a constitutional ground. It is nevertheless significant that a unanimous Supreme Court recently reversed a state judgment because the trial judge refused to ask prospective jurors about possible prejudice against black people. Ham v. South Carolina, 409 U.S. 524; 93 S.Ct. 848; 35 L.Ed.2d 46.

480 F.2d 1310, 1311.

The court of appeals below relied upon United States v. Martinez, 525 F.2d 365 (9th Cir. 1965), in which the defendant was Cuban and charged with a heroin offense. The court stated:

> Dealers and possessors of heroin are not identifiable with any race, creed or national origin.

525 F.2d 365, 368.

The position of the Ninth Circuit clearly conflicts with the established Supreme Court precedent in Aldridge (1931)

1/ In footnote 10 of the Ristaino decision, the Court also stated: "In light of our holding today, the actual result in Aldridge should be recognized as an exercise of our supervisory power over federal courts." 424 U.S. 589, 598.

and Ristaino (1976) and the Ninth Circuit's undue reliance on its own Perez-Martinez (1975) is misplaced. Even if Perez-Martinez were still the law, the facts of this case explicitly would establish that the Mexican race of the Petitioner involved in the alleged smuggling of other Mexicans into the United States is fraught with the very prejudice that this proposed voir dire sought to avoid.

Confusion has been created by this Ninth Circuit opinion which directly conflicts with the recent Sixth Circuit decision in United States v. Williams, 612 F.2d 735 (3d Cir. 1979), which held that Ristaino "made clear that had it been reviewing a federal proceeding, in the exercise of its supervisory powers it would have required that the racial-bias question be asked 'if requested by the defendant.'" 612 F.2d 735, 737.

Because the extremely truncated voir dire by the court did not adequately permit any reasonable exploration as to the racial issue, this Court must give meaning to Ristaino in the context of a federal case.

II. The judge who presided at a complex alien smuggling jury trial and sentenced a co-defendant declined to sentence the defendant as requested for the convenience of the probation office, and over objection the substitution of a different judge who had not read the trial transcript for sentencing was serious error.

The opinion (Appendix A) sets forth the facts that were adduced at the jury trial which were unknown to the sentencing judge.[2/] Evidence at trial demonstrated that there were three principal smugglers--Flores and Navarrete in Los

---

2/ It is anomalous that the reviewing court has a better understanding of the case than the sentencing judge, for the practice approved by the court of appeals does not even require that the sentencing judge, in a case where an appeal is almost certain, obtain and review the transcript of the trial prior to the imposition of sentence.

Angeles and Bowling in San Diego. Perez-Barrera and Zamora were two other involved alien smugglers, and, according to INS Criminal Investigator Sanders' hindsight knowledge, "he [Zamora] was the heaviest out of them." [R.T. 220] Falcon, who testified at trial on behalf of the Government, appeared to be in a role similar to that of the Petitioner, for Falcon worked for Navarrete and the Petitioner worked for Bowling. Having heard all the evidence at trial, Judge Corcoran sentenced co-defendant Falcon to 90 days in jail as a condition of a probationary sentence. Thomas Navarrete was never apprehended, and Flores jumped bond. Virginia Bowling, the Petitioner's employer or co-worker who testified for the Government, was permitted to plead guilty to a misdemeanor and received a probationary sentence.

After the jury returned a verdict of guilty before the visiting Judge Corcoran, defense counsel made a motion for either immediate sentencing or sentencing on 16 March (15 days later) so that the judge who tried the case could impose sentence. Judge Corcoran did not wish to impose sentence without a presentence report, for the probation office had requested Judge Corcoran to defer all sentences until "they could go through their routines." [R.T. 596] By then Judge Corcoran would have been gone. He stated, "It isn't as much a burden on me as it is on the probation department." [R.T. 597] Defense counsel made the express request that Petitioner even be taken to the District of Columbia (where Judge Corcoran regularly sits) if necessary. Defense counsel felt that a substitute judge, Judge Thompson, would not be suitable for sentencing, but the court was "sorry about that." [R.T. 598]

On 2 April 1979, after denying the request of counsel for Petitioner to have sentencing before Judge Corcoran, Judge Thompson on Count I (conspiracy) sentenced the Petitioner to a term of imprisonment of 18 months. The six remaining counts were to run consecutive with each other with a sentence of five years imposed on each (an aggregate of 30 years), but that sentence to confinement was suspended and Petitioner was placed on

a period of five years probation to follow the 18 months incarceration.

Judge Thompson had never read the transcript of the trial proceedings (over 500 pages) and had only the advantage of a presentence report as well as his observations made at the pretrial suppression hearing (testimony of government agents only). Judge Thompson did indicate to defense counsel that if the sentence was inconsistent with Judge Corcoran's position, the court would modify the sentence. Defense counsel would be placed in an awkward position of making an ex parte contact with Judge Corcoran to determine the type of sentence he may have envisioned for Petitioner.

The Ninth Circuit in interpreting Federal Rules of Criminal Procedure, Rule 25(b), permits this substitution relying upon its own precedent of United States v. Ortiz, 603 F.2d 76, 81 (9th Cir. 1979), cert. denied, 100 S.Ct. 678 (1980). In the Ortiz case, the defendant failed to appear for a scheduled sentencing, and the bond was forfeited and a bench warrant was issued. The sentencing by a substituting judge was held to be entirely proper, "and Ortiz waived whatever claim he has to equitable consideration when he failed to appear on the original sentencing date." 603 F.2d 76, 81 (emphasis added). Ortiz was inapplicable to the instant appeal.

The decision of the Ninth Circuit conflicts with United States v. Bowser, 497 F.2d 1017 (4th Cir. 1974), where the court vacated a conviction and remanded for resentencing. Bowser was convicted by a jury after trial conducted by a district court judge assigned from outside the circuit, but he was sentenced by a different judge who knew nothing of the trial or the circumstances surrounding the offense. The sentencing judge, like Judge Thompson, knew of the case from the preliminary hearing, the sentencing hearing, and the presentence report. The Fourth Circuit noted in the Bowser case the different treatment of different defendants. Although the court did not review the sentence itself, it was empowered to "'scrutinize the sentence to ascertain whether there has indeed been an exercise of discretion.'" 497 F.2d 1017, 1020.

In United States ex rel Fields v. Fitzpatrick, 548 F.2d 105 (3d Cir. 1977), the court dealt with the federal constitutional right of a defendant to have a case heard by the judge who conducted the state trial. A subsequent judge had reviewed the record, but there was no objection by the defense to the substitute judge.

These cases demonstrate that if the defendant fails to object or consents to the substitute judge [United States v. Lewis, 460 F.2d 257 (9th Cir. 1972)] or makes an implicit waiver (Ortiz), the issue might not be properly preserved for appellate review. In the instant appeal where the defense has made a request for sentencing by the original judge and objects to the substitute sentencing judge, such substitution made for the convenience of the probation department, this Court is presented with a fundamental issue of due process and federal court procedure.

The American Bar Association House of Delegates approved Standards Relating to the Administration of Criminal Justice: Sentencing Alternatives and Procedures (Second Edition, Approved Draft 1979) which provides:

> Standard 18-6.1, Sentencing Judge
>
> (a) If guilt was determined after a trial, the judge who presided at the trial should impose the sentence unless there are compelling reasons in a specific case to provide otherwise. To accommodate cases where it becomes necessary for another judge to impose sentence, a system should be established to acquaint the new judge with what occurred at the trial.

Only this Court is able to define what limits, if any, may be placed on the using of visiting judges. While the use of judges to help in the various districts is meritworthy and relieves pressure points on a temporary basis, the sentencing proceeding after a jury trial may reflect events at the trial to the defendant's detriment [Cf. United States v. Grayson, 438 U.S. 41 (1978)]. Should not the events at trial observed by the judge that may mitigate be preserved for the defendant's advantage at sentencing?

CONCLUSION

The Petitioner requests that for the above reasons that a writ of certiorari issue to review the judgment of the U.S. Court of Appeals for the Ninth Circuit and that this Court summarily reverse or set the case down for oral argument and further consideration.

Respectfully submitted,

DATED: 16 May 1980

JOHN J. CLEARY
Federal Defenders of San Diego, Inc.
225 Broadway, Suite 855
San Diego, California 92101
Telephone: 714-234-8467
FTS 895-5240

Attorneys for Petitioner

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UNITED STATES of America,
Plaintiff-Appellee,

v.

Humberto ROSALES-LOPEZ,
Defendant-Appellant.

No. 79-1302.

United States Court of Appeals,
Ninth Circuit.

March 20, 1980.

Defendant was convicted before the United States District Court for the Southern District of California, Howard F. Corcoran, Senior District Judge of District of Columbia, of various offenses involving the transportation of aliens illegally in this country, and he appealed. The Court of Appeals, J. Blaine Anderson, Circuit Judge, held that: (1) refusal to specifically inquire of jury venire whether defendant's Mexican descent would affect deliberations was not error absent showing that racial prejudice was likely to arise at trial; (2) although wrong standard was used in ruling on defendant's request for free transcript of pretrial suppression hearing, the error was harmless; (3) defendant failed to show that he was improperly sentenced by a judge who had not presided at trial; (4) there was no prosecutorial vindictiveness since defendant did not face any increased risk of punishment in response to request for jury trial; and (5) consecutive sentences were proper since offenses did not constitute a single criminal act.

Affirmed.

1. Criminal Law ⇐1152(2)
Jury ⇐131(2)

Scope of voir dire is a matter within the sound discretion of the trial judge, and will not be disturbed on appeal unless the procedures used or questions propounded are so unreasonable as to constitute an abuse of discretion.

2. Jury ⇐131(4)

There was no error, in prosecution for offenses involving illegal transportation of aliens, in refusing defendant's voir dire questions as to whether a juror had ever employed or had friends that had employed illegal aliens, whether any juror had worked for the federal government, whether any juror had been victim of crime, whether any juror had sat in a prior civil or criminal case and whether a juror was able to speak Spanish. Immigration and Nationality Act, § 274, 8 U.S.C.A. § 1324.

3. Jury ⇐131(6)

Questions regarding possible racial prejudice should be put to the venire in prosecutions of minority defendants, at least where special circumstances indicate that defendant's race may be a factor at trial; however, such voir dire requirement is not imposed on district courts absent some indication that prejudice is likely to arise or that the trial will have racial overtones.

4. Jury ⇐131(6)

Refusal to ask jury venire if defendant's Mexican descent would affect their deliberations in prosecution for illegal transportation of aliens was not error absent an indication that racial prejudice was likely to arise at trial especially as trial judge inquired into feelings of jurors on illegal alien problem and excluded two jurors on that basis. Immigration

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APPENDIX "A"

and Nationality Act, § 274, 8 U.S.C.A. § 1324.

5. Costs ⇐302

Duty of the government to provide an indigent criminal defendant with the essential tools of trial defense is one of constitutional and statutory dimensions. 18 U.S.C.A. § 3006A.

6. Costs ⇐302.1(1)

Under certain circumstances, a transcript of a prior proceeding related to a criminal prosecution may be an item which the government is required to furnish to the indigent. 18 U.S.C.A. § 3006A.

7. Costs ⇐302.1(2, 4)

In case of a mistrial, courts generally regard a transcript of a prior trial as a tool "reasonably necessary" to an effective defense and have deemed it error to refuse to provide defendant with such a transcript, provided timely request for production is made; however, where the indigent requests a transcript of preliminary proceeding, courts have been less willing to find error in failure to so provide. 18 U.S.C.A. § 3006A.

8. Costs ⇐302.1(1)

Particularized need is not the applicable test for necessity for a free transcript of a prior proceeding related to a criminal prosecution. 18 U.S.C.A. § 3006A.

9. Criminal Law ⇐1165(1)

Although trial court erred in utilizing particular need test in passing on defendant's request for transcript of pretrial suppression hearing, which transcript was sought to impeach trial testimony of government agent, the error was harmless where defendant could point to only two minor inconsistencies between suppression hearing testimony and trial testimony and there was otherwise overall strong consistency between lengthy testimony given by witness at the hearing and the trial. 18 U.S.C.A. § 3006A.

10. Criminal Law ⇐977(2)

Procedure whereby a district judge who did not preside at trial may pass sentence is proper where the sentencing judge is familiar with the case and uses informed discretion in passing sentence. Fed.Rules Cr.Proc. Rule 25(b), 18 U.S.C.A.

11. Criminal Law ⇐977(2)

Passing of sentence by judge who had not presided at trial was not error where sentencing judge had presided over certain pretrial matters and had studied presentencing report and sentence itself reflected an informed discretion especially since consecutive sentences on six of the counts were suspended. Fed.Rules Cr.Proc. Rule 25(b), 18 U.S.C.A.

12. Constitutional Law ⇐257

The defendant's right to due process is violated where the prosecution increases the severity of alleged charges in response to the exercise of a constitutional or statutory right. U.S.C.A.Const. Amends. 5, 14.

13. Constitutional Law ⇐257.5

Prosecutorial vindictiveness is normally found where the government has occasion to reindict or retry the defendant following the exercise of a procedural right. U.S.C.A.Const. Amends. 5, 14.

14. Constitutional Law ⇐265

Prosecutorial vindictiveness in reindicting a defendant will not be found where the charges contained in the second indictment expose defendant to no greater risk of punishment than did those contained in the first indictment. U.S.C.A.Const. Amends. 5, 14.

15. Constitutional Law ⇐257.5

Although other members of alien-smuggling ring were allowed to plead to lesser misdemeanor counts and placed on probation, defendant's prosecution on felony counts would not be found vindictive on ground that defendant insisted on jury trial since defendant did not face any increased risk of punishment in response to exercise of his rights and, if anything, risk of punishment was lessened by superseding indictment which dropped a number of the original counts. U.S.C.A.Const. Amend. 5; Immigration and Nationality Act, § 274, 8 U.S.C.A. § 1324.

16. Indictment and Information ⇐191

Aiding and abetting illegal entry of an alien was not chargeable as a lesser included offense of concealing, harboring, shielding and illegally transporting aliens. 18 U.S.C.A. § 2; Immigration and Nationality Act, §§ 274, 274(a)(1), 275, 8 U.S.C.A. §§ 1324, 1324(a)(1), 1325.

17. Criminal Law ⇐1210

Imposition of consecutive sentences on separate counts is improper whether separate offenses encompass successive steps or grades which normally flow into the same criminal act; example of an instance where separate offenses flow into the same criminal act is an indictment for illegal entry by an alien and illegal reentry of a deported alien where the alien is charged with violating both statutes by single act of entry. Immigration and Nationality Act, §§ 275, 276, 8 U.S.C.A. §§ 1325, 1326.

18. Criminal Law ⇐1210

Imposition of consecutive sentences for conspiracy, aiding and abetting illegal transportation of aliens, and concealing, harboring and shielding illegal aliens did not constitute unreasonable pyramiding of punishment since offenses did not constitute a single criminal act, in that defendant had engaged in some advance planning with other members of smuggling ring, had sheltered aliens at another's residence and had been clearly involved in transportation of aliens from Imperial Beach to Los Angeles. 18 U.S.C.A. §§ 2, 371; Immigration and Nationality Act, §§ 274, 274(a)(2, 3), 8 U.S.C.A. §§ 1324, 1324(a)(2, 3).

19. Aliens ⇐40
Constitutional Law ⇐250.1(2)

Exemption of employers from statute making it an offense to harbor certain aliens does not violate equal protection and thus, nonemployer defendant's prosecution for "harboring" did not violate equal protection. Immigration and Nationality Act, § 274, 8 U.S.C.A. § 1324; U.S.C.A.Const. Amend. 14.

Appeal from the United States District Court for the Southern District of California The Honorable Howard F. Corcoran, Presiding.

Before WALLACE and ANDERSON, Circuit Judges, and PALMIERI,* District Judge.

J. BLAINE ANDERSON, Circuit Judge:

Defendant Humberto Rosales-Lopez appeals his conviction below for one count of conspiracy to conceal, harbor and shield, and illegally transport aliens in violation of 18 U.S.C. § 371 and 8 U.S.C. § 1324, three counts of aiding and abetting the illegal transportation of aliens, in violation of 8 U.S.C. § 1324(a)(2) and 18 U.S.C. § 2, and three counts of concealing, harboring and shielding aliens in violation of 8 U.S.C. § 1324(a)(3). Rosales-Lopez was sentenced to serve five years for each count, with each sentence to run consecutively, but the sentences for each of the last six counts were suspended. We affirm on all issues.

I. *BACKGROUND*

Rosales-Lopez, a resident alien, was involved in an illegal alien smuggling operation in Southern California. Briefly stated, the object of the plan was to transport aliens who had surreptitiously crossed the Mexican-American border from a point in Imperial Beach, California, by automobile up Interstate Five to a drop point in Los Angeles. Rosales-Lopez' conviction in December 1978, arises from his arrest for the transportation of three Mexican aliens from Imperial Beach to Los Angeles.

The three aliens, led by a guide whose identity remains unknown, left Tijuana on foot and crossed the border under cover of darkness. The guide took them to a car parked on the American side of the border, and drove them to the residence of Virginia Hendricks Bowling in Imperial Beach. Bowling, an American citizen, lived at the Imperial Beach residence with her daughter. Sometime in July 1978, Rosales-Lopez had become romantically involved with Bowling's daughter and had moved into the Imperial Beach residence. When the three aliens whose entry is at issue here arrived early on the morning of December 11, Rosales-Lopez admitted them, along with the guide, into the garage of the Bowling house.

The method of transporting the aliens apparently conformed to a plan which had been followed on previous occasions. The guide and the aliens entered the trunk of a green Oldsmobile, and Rosales-Lopez closed the lid of the trunk. Bowling then entered the Oldsmobile and drove it north on Interstate Five through the San Clemente checkpoint, with Rosales-Lopez following in a grey Ford. Once both automobiles had cleared the checkpoint, they pulled off into a parking lot and Bowling exchanged cars with Rosales-Lopez. The guide emerged from the trunk of the Oldsmobile and proceeded to drive to Los Angeles, with Rosales-Lopez seated on the passenger side. The purpose of Bowling driving the car through the checkpoint was to deter suspicion by avoiding the use of a Latin-appearing driver. Bowling returned to Imperial Beach in the Ford, following the exchange of cars.

The Oldsmobile was driven to an apartment in Los Angeles, where the aliens were let out of the trunk and told by Rosales-Lopez to go upstairs into the apartment. The apartment was apparently occupied by a number of other illegal aliens who had been transported to the location by other means. Sometime after the arrival of Rosales-Lopez, the guide, and the three aliens, the other named principals in the smuggling arrangement, David Falcon-Zavala and Joe Manuel Flores, arrived at the apartment, apparently under orders from a person higher up in the smuggler's chain of command. Falcon-Zavala and Flores were to be involved in the transportation of the numerous aliens present at the apartment to specific locations in Southern California which were the aliens' ultimate destinations.

Agents of the Immigration and Naturalization Service had been maintaining surveillance over both the Los Angeles apartment and the Imperial Beach residence for a number of weeks prior to December 11. In fact, agents had followed the progress of the green Oldsmobile from Imperial Beach to Los Angeles that morning. Agents had observed Rosales-Lopez open the trunk of the Oldsmobile at Los Angeles, and had also observed the aliens leave the trunk and proceed up the stairs. In addition, automobile traffic around the apartment had been heavy. The agents concluded that the apartment was being used as a drop site for illegal aliens.

At approximately noon on December 11, Flores departed in an automobile with two of the aliens. Agents stopped the Flores car a few blocks away and obtained admissions from the aliens that they were present in the United States illegally. A short time later, Rosales-Lopez, Falcon-Zavala, and one of the aliens who had been transported in the trunk of the Oldsmobile left the apartment in another automobile. Agents approached the car while it was stopped at a gas station. All three occupants were arrested. A short time later, agents raided the apartment, and all of the aliens present were taken into custody.

Rosales-Lopez, Flores, Falcon-Zavala, and Bowling were originally indicted on sixteen counts of conspiracy, harboring and shielding aliens, aiding and abetting, and illegal transportation of aliens. Falcon-Zavala and Bowling each plead guilty to misdemeanors. Flores became a fugitive whose whereabouts apparently remain unknown. A superseding indictment filed February 9, 1979, charged Rosales-Lopez and Flores with seven counts of conspiracy, concealing and harboring, illegal transportation, and aiding and abetting. Rosales-Lopez was convicted and sentenced on each count. Procedural details will be developed as necessary in the opinion.

II. *ISSUES ON APPEAL*

Rosales-Lopez raises seven issues on appeal:

(1) Whether the district judge's voir dire of the jury venire was adequate to detect potential bias or prejudice;

(2) Whether the trial court erred in refusing to provide Rosales-Lopez, an indigent, with a free copy of the transcript of a suppression hearing;

(3) Whether sentencing was improperly imposed by a district judge who did not preside at trial;

(4) Whether the district court erred by denying Rosales-Lopez an evidentiary hearing on possible prosecutorial vindictiveness;

* The Honorable EDMUND L. PALMIERI, Senior United States District Judge, Southern District of New York, sitting by designation.

(5) Whether the district court erred in refusing to give an instruction on a lesser-included offense;

(6) Whether consecutive sentences were improperly imposed;

(7) Whether the exemption from prosecution for employers contained in 8 U.S.C. § 1324 denies Rosales-Lopez equal protection of the laws.

III. *VOIR DIRE*

Pursuant to the "Arizona Plan" utilized in the Southern District of California, the trial judge conducted the voir dire of the jury venire. Counsel for Rosales-Lopez submitted several requested questions to the court prior to voir dire, a number of which the judge declined to ask. Rosales-Lopez claims reversible error in the court's failure to make six specific inquiries.

[1, 2] We affirm as to five of the six with only brief comment.[1] The scope of voir dire is a matter within the sound discretion of the trial judge, and will not be disturbed on appeal unless the procedures used or questions propounded are so unreasonable as to constitute an abuse of discretion. *United States v. Baldwin*, 607 F.2d 1295 (9th Cir. 1979). After reviewing the entire voir dire procedure, we cannot say that the questions propounded were insufficient to probe for bias. We find no error generally in the refusal to ask five of the six questions.

[3] Rosales-Lopez also requested that the court inquire whether his Mexican descent would affect the jurors' deliberations.[2] While we also affirm on this question, we feel that a more extended discussion is in order. A longstanding rule of criminal justice in the federal courts holds that questions regarding possible racial prejudice should be put to the venire in prosecutions of minority defendants, at least where "special circumstances" indicate that the defendant's race may be a factor in the trial. *See Ristaino v. Ross*, 424 U.S. 589, 96 S.Ct. 1017, 47 L.Ed.2d 258 (1976); *Aldridge v. United States*, 283 U.S. 308, 51 S.Ct. 470, 75 L.Ed. 1054 (1931). The extent of the federal rule is unclear. Some circuits have applied what amounts to a *per se* rule that a racial prejudice question must be put to the venire in all cases where the defendant is a member of a minority group. *See, e. g., United States v. Bowles*, 574 F.2d 970 (8th Cir. 1978); *United States v. Bell*, 573 F.2d 1040 (8th Cir. 1978); *United States v. Robinson*, 485 F.2d 1157 (3d Cir. 1973). Our circuit, however, has declined to impose such a voir dire requirement upon district courts absent some indication that prejudice is likely to arise, or that the trial will have racial overtones. *See United States v. Perez-Martinez*, 525 F.2d 365 (9th Cir. 1975); *United States v. Walker*, 491 F.2d 236 (9th Cir.), *cert. denied*, 416 U.S. 990, 94 S.Ct. 2399, 40 L.Ed.2d 768 (1974).

1. The five requested questions were phrased as follows:

"6. Have you ever employed or have had friends that have employed illegal aliens?"

"13. Have you ever worked for the federal Government? If so, as what? How long?"

"16. Have you ever been a victim of a crime?

"18. Have you ever sat as a juror in a civil or criminal case? What was the nature of the case and the verdict?"

"23. Are you able to speak Spanish? If so, how well? Would you be willing to accept the interpreter's translation?"

2. The question as submitted read:

"7. Would you consider the race or Mexican descent of Humberto Rosales-Lopez in your evaluation of this case? How would it affect you?

Under the principle of stare decisis, we are constrained to follow our holding in *Perez-Martinez, supra*, unless a subsequent decision of this court or of the United States Supreme Court has altered its basic principle. The Supreme Court addressed the question after our decision in *Perez-Martinez* in *Ristaino v. Ross, supra*, a state prosecution of a black defendant charged with an assault upon a white security guard. In determining that there is no constitutional compulsion upon state courts to inquire into racial prejudice on voir dire, the Court noted that the duty imposed upon federal courts under the Court's supervisory power is much broader:

> "Although we hold that voir dire questioning directed to racial prejudice was not constitutionally required, the wiser course generally is to identify racial prejudice if required by the defendant. Under our supervisory power we would have required as much of a federal court faced with the circumstances here."

424 U.S. at 597 n.9, 96 S.Ct. at 1022 n.9.

We do not find that *Ristaino's* cryptic reference to the federal rule requires that we disregard *Perez-Martinez*. While the Court found that there was not a "significant likelihood that racial prejudice might infect Ross' trial," 424 U.S. at 598, 96 S.Ct. at 1022, we note that the facts of *Ristaino* presented a greater likelihood of prejudice than do the facts of the present case. At least one other circuit has arrived at a similar conclusion in its interpretation of *Ristaino*. See *United States v. Polk*, 550 F.2d 1265 (10th Cir.), *cert. denied*, 434 U.S. 838, 98 S.Ct. 129, 54 L.Ed.2d 100 (1977). Accordingly, we hold that the Mexican heritage of Rosales-Lopez did not, in and of itself, require the court below to pose a question on racial prejudice to the venire.

[4] We also find no circumstances in the record indicating that racial prejudice was likely to arise at trial. Perhaps the greatest potential for prejudice arose from the charge of harboring and transporting illegal aliens in a locality where the problem of illegal alien entry is a particularly sensitive issue. The trial judge, however, inquired into the feelings of the jurors on the illegal alien problem, and two jurors were excused on that basis. We find that the voir dire in this case adequately probed the venire for potential bias on all issues.

IV. *TRANSCRIPT OF SUPPRESSION HEARING*

In the course of his pre-trial motions, Rosales-Lopez moved to suppress certain evidence, and Judge Thompson conducted an evidentiary hearing on February 5, 1979. At the close of the hearing, counsel for Rosales-Lopez moved to obtain a copy of the hearing transcript at government expense on the ground that his client was indigent. Judge Thompson denied the motion to provide the transcript and, though the record here is ambiguous,[3] apparently referred the matter

3. The following exchange took place between defense counsel and Judge Thompson at the close of the hearing:

"Mr. Cleary: The reason I mentioned that was there is some indication, and I didn't raise those points here, concerning certain aspects of conduct, and at least the stated

to the magistrate. On February 13, Magistrate Infante granted the motion to produce the transcript and signed a standard CJA Form 21 voucher. On February 21, however, Judge Thompson issued a memorandum denying defense counsel's request for the transcript, citing the failure to demonstrate any "particularized need" for it. Judge Corcoran, to whom the case was assigned for trial, refused to overrule Judge Thompson on the transcript question.

Rosales-Lopez asserts that the allegedly irregular method of reviewing the magistrate's ruling requires reversal, and raises both constitutional and statutory issues on the denial of the transcript. Because we find that the denial of the transcript was harmless beyond a reasonable doubt, we find it unnecessary to address the procedural question raised by Rosales-Lopez.

[5-7] While we are convinced that Rosales-Lopez was not prejudiced by the government's failure to provide him with a transcript, we feel some comments on the issue of providing trial aids to indigents are in order. The duty of the government to provide an indigent criminal defendant with the essential tools of trial defense is of both a constitutional and statutory dimension. *See generally Britt v. North Carolina*, 404 U.S. 226, 92 S.Ct. 431, 30 L.Ed.2d 400 (1971); 18 U.S.C. § 3006A. Under certain circumstances, a transcript of a prior proceeding related to a criminal prosecution may be an item which the government is required to furnish to the indigent. *See Britt v. North Carolina, supra; Roberts v. LaVallee*, 389 U.S. 40, 88 S.Ct. 194, 19 L.Ed.2d 41 (1967). Where a mistrial has occurred, courts have generally regarded a transcript of the prior trial as a tool "reasonably necessary" to an effective defense and have deemed it error to refuse to provide the defendant with such a transcript, provided that a timely request is made for its production. *See, e. g., United States v. Johnson*, 584 F.2d 148 (6th Cir. 1978), *cert. denied sub nom., Monger v. United States*, 440 U.S. 918, 99 S.Ct. 1239, 59 L.Ed.2d 469 (1979); *United States v. Jonas*, 540 F.2d 566 (7th Cir. 1976); *United States v. Baker*, 523 F.2d 741 (5th Cir. 1975); *United States v. Acosta*, 495 F.2d 60 (10th Cir. 1974); *United States v. Young*, 472 F.2d 628 (6th Cir. 1972); *United States ex rel. Wilson v. McMann*, 408 F.2d 896 (2d Cir. 1969); *Peterson v. United States*, 351 F.2d 606 (9th Cir. 1965); *But see United States v. Brown*, 443 F.2d 659, 143 U.S. App.D.C. 244 (D.C.Cir.1970); *Forsberg v. United States*, 351 F.2d 242 (9th Cir. 1965).

intention of the government to seek reindictment in this because of some of the defects in my pleadings. The one thing I would like to preserve at this time is a motion at this time for a transcript of these proceedings so that in the event of trial, which is now anticipated, I would have the opportunity for effective cross-examination—I only have my seven pages of notes—which is in *Britt v. North Carolina*, the requirement of keeping adequate notes to effectively cross-examine and confront what I assume will be two adverse witnesses at the time of trial.

"The Court: Those matters and matters of discovery, I'm not going to order any transcript relative to this hearing at all.

"Mr. Cleary: Could I ask that rather than dismissing my motions that my motions be transferred to the magistrate?

"The Court: No. It's improperly brought in this court according to local rules, so it would be dismissed without prejudice, which means you can bring it again." R.T. 92-93.

Where, however, the indigent defendant requests a transcript of a preliminary proceeding, courts have been less willing to find error in the failure to so provide. In *Roberts v. LaVallee, supra*, the Supreme Court struck down per curiam on equal protection grounds a New York statute which required all criminal defendants to pay five cents for every hundred words of requested transcripts of preliminary proceedings. The Court, however, did not address the limits of the indigent's right to a free transcript in such cases. Circuit courts considering the issue have generally shown a greater inclination to examine the actual prejudice to the defendant resulting from the denial of a transcript of a preliminary hearing than has been shown in cases involving the denial of a trial transcript. In *United States ex rel. Moore v. People of the State of Illinois*, 577 F.2d 411 (7th Cir. 1978), *cert. denied*, 440 U.S. 919, 99 S.Ct. 1242, 59 L.Ed.2d 471 (1979), the court found error in the failure to provide a transcript of a preliminary hearing at which an allegedly suggestive confrontation took place between the defendant and a rape victim, but held the error to be harmless beyond a reasonable doubt. In *United States ex rel. Cadogan v. LaVallee*, 428 F.2d 165 (2d Cir. 1970), *cert. denied*, 401 U.S. 914, 91 S.Ct. 887, 27 L.Ed.2d 813 (1971), failure to provide a transcript of a suppression hearing was held to be not prejudicial where alleged discrepancies between testimony given at the hearing and at trial were "trivial."

[8, 9] While the standard of reasonable necessity in the area of free transcripts remains imprecise, the court below applied a standard which we find to be incorrect. The Supreme Court in *Britt v. North Carolina, supra*, ruled out "particularized need" as the applicable test for necessity. *See* 404 U.S. at 228, 92 S.Ct. at 434. We find, however, that the application of an erroneous legal standard in this case was harmless beyond a reasonable doubt. Rosales-Lopez claims prejudice in that two Immigration Service agents gave testimony at the suppression hearing which would have been useful in impeaching their testimony at trial. The defense, however, can point to only two minor inconsistencies between the testimony at the suppression hearing and the testimony given at trial.[4] Given the overall strong consistency between the lengthy testimony given by the witness at the hearing and the trial, we find beyond a reasonable doubt that the lack of a copy of the suppression hearing transcript did not prejudice the ability of the defense to cross-examine effectively and thereby present an adequate defense at trial.

V. *SENTENCING PROCEDURE*

Rosales-Lopez claims that he was improperly sentenced by Judge Thompson,

4. At the suppression hearing, Investigator Sanders testified that after the Oldsmobile arrived at the Los Angeles address, he made the following observation: ". . . . I saw three people get out of the trunk of the Oldsmobile and go up the stairs to the second story apartment, with Humberto Rosales and the unknown Latin behind him." (R.T. 42) At trial, Investigator Sanders testified that Rosales-Lopez and the unknown male 'hurried' the aliens up the stairs." (R.T. 196).

A second alleged inconsistency arose where, at the suppression hearing, Investigator Sanders described the driver of the Oldsmobile as ". . . . a male Latin, with short, black hair. I believe he was wearing sunglasses, probably about 25 to 30 years old, maybe." (R.T. 73) At trial, Sanders described the driver as having "some kind of glasses," and described his age as "around 30." (R.T. 212).

who had not presided at trial. Judge Corcoran, a visiting judge who sat in the district by designation, had presided at the trial but had returned to his home district prior to sentencing.

[10, 11] Fed.R.Crim.Proc. 25(b) allows for a district judge who did not preside at trial to pass sentence where the presiding judge is unable to do so by reason of "absence, death, sickness or other disability." The procedure under Rule 25(b) is proper where the sentencing judge is familiar with the case, and uses informed discretion in passing sentence. *United States v. Ortiz*, 603 F.2d 76, 81 (9th Cir. 1979), *cert. denied*, —— U.S. ——, 100 S.Ct. 678, 62 L.Ed.2d 652 (1980). In this case, Judge Thompson had presided over certain pre-trial matters, and had studied the presentencing report. The sentence itself reflects an informed discretion since the consecutive sentences on six of the counts were suspended. The passing of sentence by Judge Thompson was not error.

VI. *PROSECUTORIAL VINDICTIVENESS*

Rosales-Lopez moved for dismissal below on the ground of vindictive prosecution, and for an evidentiary hearing relating to the dismissal motion. The court denied both motions.

The basis of the dismissal motion was that other members of the alien smuggling ring were allowed to plead to lesser misdemeanor counts and placed on probation. Rosales-Lopez maintains that his prosecution on felony counts was in response to his insistence on a jury trial, and that he was thereby "penalized" for exercising a constitutional right.

[12-14] A defendant's right to due process of law is violated where the prosecution increases the severity of alleged charges in response to the exercise of a constitutional or statutory right. *See generally Blackledge v. Perry*, 417 U.S. 21, 94 S.Ct. 2098, 40 L.Ed.2d 628 (1974); *North Carolina v. Pearce*, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969); *United States v. Ruesga-Martinez*, 534 F.2d 1367 (9th Cir. 1976). Vindictiveness is normally found where the government has occasion to re-indict or re-try a defendant following the exercise of a procedural right. *See United States v. Ruesga-Martinez*, *supra*, at 1369. Our circuit has refused to find the action of the prosecutor in reindicting a defendant vindictive where the charges contained in the second indictment expose the defendant to no greater risk of punishment than did those contained in the first indictment. *See United States v. Snell*, 592 F.2d 1083 (9th Cir.), *cert. denied*, 442 U.S. ——, 99 S.Ct. 2889, 61 L.Ed.2d 315 (1979).

[15] In the present case, Rosales-Lopez has not faced any increased risk of punishment in response to the exercise of his rights. If anything, his risk of punishment was lessened by the superseding indictment, which dropped a number of the original counts. The court below did not err in refusing to dismiss on the basis of vindictive prosecution.

VII. *INSTRUCTION ON LESSER INCLUDED OFFENSE*

Rosales-Lopez requested, but did not receive, an instruction on the lesser-included offense of aiding and abetting the illegal entry of an alien under 8 U.S.C. § 1325 and 18 U.S.C. § 2. He argues that 8 U.S.C. § 1324(a)(1) contains an element of knowledge that the alien entered the United States within the past three years, which is in addition to the elements of aiding and abetting entry under § 1325.

[16] We cannot agree that § 1325 is properly chargeable as a lesser included offense. An element of the charge of aiding and abetting any offense under 18 U.S.C. § 2 is guilty knowledge. In this regard, we cannot find that § 1324 imposes an additional element in the government's burden of proof. *Cf. United States v. Wishart*, 582 F.2d 236 (2d Cir.), *cert. denied*, 439 U.S. 987, 99 S.Ct. 582, 58 L.Ed.2d 660 (1978); *United States v. Madden*, 525 F.2d 972 (5th Cir. 1976).

VIII. *CONSECUTIVE SENTENCES*

Rosales-Lopez contends that the imposition of consecutive sentences for conviction on counts of conspiracy, aiding and abetting the illegal transportation of aliens, and concealing, harboring and shielding illegal aliens constitutes an unreasonably pyramiding of punishment in contravention of the intent of Congress in enacting the statutory scheme dealing with illegal aliens.

[17] The imposition of consecutive sentences on separate counts is improper where the separate offenses encompass successive steps or grades which normally flow into the same criminal act. *United States v. Hernandez-Miranda*, 601 F.2d 1104, 1109 (9th Cir. 1979). An example of an instance where separate offenses flow into the same criminal act is an indictment for illegal entry by alien, 8 U.S.C. § 1325, and illegal re-entry of a deported alien, 8 U.S.C. § 1326, where the alien is charged with violating both statutes by a single act of entry. *United States v. Ortiz-Martinez*, 557 F.2d 214 (9th Cir. 1977).

[18] The offenses with which Rosales-Lopez was charged do not constitute a single criminal act. The evidence adduced at trial revealed that Rosales-Lopez had engaged in some advance planning with other members of the smuggling ring, had sheltered the aliens at the Bowling residence, and had been clearly involved in the transportation of the aliens from Imperial Beach to Los Angeles. While it may not be unusual for these acts to occur in close relation to each other, each constitutes a separate danger to the public interest in preventing the entry of illegal aliens and it is reasonable to find that Congress intended for each to be punished separately. No error was committed in the imposition of consecutive sentences.

IX. *EQUAL PROTECTION*

[19] 8 U.S.C. § 1324 contains a specific exemption proclaiming that employment of aliens shall not constitute "harboring." Rosales-Lopez claims that this exemption violates equal protection, and that his prosecution under the section was, therefore, illegal. Contrary to the assertion of defense counsel, we adequately disposed of this argument in *United States v. Acosta de Evans*, 531 F.2d 428 (9th Cir.), *cert. denied*, 429 U.S. 836, 97 S.Ct. 103, 50 L.Ed.2d 101 (1976). That decision is controlling. Rosales-Lopez was not denied equal protection of the laws.

X. *CONCLUSION*

The judgment of the court below, and the imposition of sentences are

AFFIRMED.

RECEIVED
MAY 14 1980

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. HUMBERTO ROSALES-LOPEZ, Defendant-Appellant.	No. 79-1302 D.C.Crim. # 78-0863-01 ORDER

Before: WALLACE and ANDERSON, Circuit Judges, and PALMIERI,* District Judge

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

FILED

MAY 12 1980

RICHARD H. DERNE
CLERK, U.S. COURT OF APPEALS

*the Honorable Edmund L. Palmieri, Senior United States District Judge, Southern District of New York, sitting by designation.

FPI-SST-10378
125M-1280

APPENDIX "B"

Supreme Court, U. S.
FILED
NOV 10 1980
MICHAEL RODAK, JR., CLERK

No. 79-6624

In the Supreme Court of the United States

OCTOBER TERM, 1980

HUMBERTO ROSALES-LOPEZ, PETITIONER,

v.

UNITED STATES OF AMERICA, RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOINT APPENDIX

WADE H. McCREE, JR.
Solicitor General
PHILIP B. HEYMANN
Assistant Attorney General
JOHN F. DePUE
Attorney
Department of Justice
Washington, D.C. 20530
(202) 633-2217
Counsel for Respondent

JOHN J. CLEARY
Federal Defenders of San Diego, Inc.
225 Broadway, Suite 855
San Diego, California 92101
(714) 234-8467
FTS 895-5240
Counsel for Petitioner

PETITION FOR CERTIORARI FILED MAY 20, 1980.
CERTIORARI GRANTED OCTOBER 6, 1980.

TABLE OF THE PARTS OF THE RECORD

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[1] "C.R. DOC:" refers to the document number assigned by the district court clerk in the Clerk's Record or official papers of the district court.

[2] "R.T." refers to the Reporter's Transcript of the trial proceedings.

DOCKET ENTRIES

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA

U.S. v. ROSALES-LOPEZ, HUMBERTO

Criminal No. 78-00863-01

* * * * *

Date	*Proceedings*
1978	
12/12	Fld cmplt (McCue) Deft arr; Ent ord P/E set 12/21/78 at 10:00 am, Bond set at $10,000 C/S; M/Ws:atty apptd: Mark Zickel CJA; Bond set at $1,000 C/S; B/R date set 12/21/78 at 10:00 am. (INFANTE)
	* * *
1979	
2-26-79	Ent ord—Cont to 2-27-79 at 9am for J/T. (CORCORAN) Fld deft's requested voir dire t/w proof of serv Fld deft's mot in limine to obtain ord to preserve a fair trial t/w proof of serv
2-27-79	JURY TRIAL—1st DAY—Jurors impaneled and sworn; swore wits; fld exhibits. BEFORE TRIAL—Mot to dismiss for individeious (sic) prosecution mot to dismiss indict—denied; mot to suppress evidence and

DOCKET ENTRIES

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE,

v.

HUMBERTO ROSALES-LOPEZ, DEFENDANT-APPELLANT.

No. 79-1302

Date	*Filings-Proceedings*
	* * *
1980	
MAR 21	AS OF 3/20/80, FILED OPINION—AFFIRMED.
MAR 21	AS OF 3/20/80, FILED & ENTERED JUDGMENT.
	* * *
MAY 14	Filed, as of 5/12/80, order (WL, A & Palmieri) The petition for rehearing is DENIED and the suggestion for a rehearing en banc is REJECTED.
20 MAY 1980	MANDATE ISSUED
	* * *
	statements denied; mots in limine re prior testimony of deft—granted. mot to suppress prior statements and omit from govt's opening statement denied. Entord—Cont'd for furth J/T to 2-28-79 at 9am.
2-28-79	JURY TRIAL—2nd DAY—Swore wits, fld exhibits; Entord—Fld defts requested jury instructions; defts mot for mistrial denied; defts mot for J/A denied. Contd for furth J/T to 3-1-79 at 9am.
	* * *

3-1-79 Entord—Mot for judgment of acquittal denied. 11:55 jury retires; 3:50pm jury returns; Verdict: GUILTY all cts, polled; Ref to P/O for I/R and cont to 4-2-79 at 8:30am before Judge THOMPSON for sent. Fld crts given instructions.

* * *

4-2-79 Entord—Judgment: Ct 1: Commtd cust AG impr 18 mos; On ea ct 2–7; Commtd AG impr 5yrs ea ct consec; Exec sent as to cts 2–7 susp & prob for 5 yrs superv waived. On mot USAtty dismiss underlying indict. Fld judgment, issed cys ENT 4-3-79 JS-3

* * *

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

November 1978—Grand Jury

Criminal Case No. 780863-1, 2-6-

(Superseding)

INDICTMENT—Filed Feb. 9, 1979

Title 18, U.S.C., Sec. 371; Title 8, U.S.C., Sec. 1324—Conspiracy to Conceal, Harbor, and Shield Aliens, and Illegal Transportation of Aliens; Title 8, U.S.C., Sec. 1324(a)(3)—Concealing, Harboring, and Shielding Aliens; Title 8, U.S.C., Sec. 1324(a)(2)—Illegal Transportation of Aliens; Title 18, U.S.C., Sec. 2—Aiding and Abetting

UNITED STATES OF AMERICA, PLAINTIFF,

v.

HUMBERTO ROSALES-LOPEZ, JOE MANUEL FLORES, DEFENDANTS.

The Grand Jury charges:

COUNT ONE

Beginning at a date unknown to the Grand Jury and continuing up to and including December 11, 1978, within the Southern and Central Districts of California and other places unknown, defendants HUMBERTO ROSALES-LOPEZ and JOE MANUEL FLORES, and others known and unknown to the Grand Jury, unlawfully, wilfully, and knowingly did combine, conspire, and agree together and with each other and with David Falcon-Zavala and Virginia Hendricks Bowling,

both of whom not here charged, to violate certain laws of the United States, to wit: to violate Title 8, United States Code, Section 1324.

It was a part of said conspiracy that the defendants and others would wilfully and knowingly conceal, harbor, and shield, and attempt to conceal, harbor, and shield from detection, aliens not lawfully entitled to enter or reside in the United States.

It was further a part of the said conspiracy that the defendants and others would transport and move, and attempt to transport and move, aliens within the United States by means of transportation and otherwise, knowing them to be in the United States in violation of law, and in furtherance of such violation of law, and knowing or having reasonable grounds to believe that their last entry into the United States occurred less than three years prior thereto; all in violation of Title 18, United States Code, Section 371.

OVERT ACTS

In pursuance of the said conspiracy, and to further the objects thereof, the following overt acts, among others, were committed within the Southern District of California:

1. On or about December 11, 1978, defendant HUMBERTO ROSALES-LOPEZ drove a vehicle in the Southern District of California.
2. On or about December 11, 1978, defendant JOE MANUEL FLORES drove a vehicle in the Central District of California.
3. On or about December 11, 1978, previously-indicted coconspirator, David Falcon-Zavala, drove a vehicle in the Central District of California.

4. On or about December 11, 1978, previously-indicted coconspirator, Virginia Hendricks Bowling, drove a vehicle in the Southern District of California.

COUNT TWO

On or about December 11, 1978, within the Southern District of California, Virginia Hendricks Bowling, not here charged, knowing that an alien, namely, Dimas Valdez-Caldera, was then in the United States in violation of law and, having reasonable grounds to believe that said alien's entry into the United States occurred less than three years prior to the aforesaid date, did transport and move, and attempt to transport and move, said alien within the United States, in furtherance of such violation of law; in violation of Title 8, United States Code, Section 1324(a)(2); and defendant HUMBERTO ROSALES-LOPEZ aided, abetted, counseled, induced and procured the commission of the aforesaid offense; in violation of Title 18, United States Code, Section 2.

COUNT THREE

On or about December 11, 1978, within the Southern District of California, Virginia Hendricks Bowling, not here charged, knowing that an alien, namely, Victor Rodriguez-Valdez, was then in the United States in violation of law and, having reasonable grounds to believe that said alien's entry into the United States occurred less than three years prior to the aforesaid date, did transport and move, and attempt to transport and move, said alien within the United States, in furtherance of such violation of law; in violation of Title 8, United States Code, Section 1324(a)(2); and defendant HUMBERTO ROSALES-LOPEZ aided, abetted, counseled, induced and procured the commission of the aforesaid offense; in violation of Title 18, United States Code, Section 2.

COUNT FOUR

On or about December 11, 1978, within the Southern District of California, Virginia Hendricks Bowling, not here charged, knowing that an alien, namely, Armando Valdez-Quintanor, was then in the United States in violation of law and, having reasonable grounds to believe that said alien's entry into the United States occurred less than three years prior to the aforesaid date, did transport and move, and attempt to transport and move, said alien within the United States, in furtherance of such violation of law; in violation of Title 8, United States Code, Section 1324(a)(2); and defendant HUMBERTO ROSALES-LOPEZ aided, abetted, counseled, induced and procured the commission of the aforesaid offense; in violation of Title 18, United States Code, Section 2.

COUNT FIVE

On or about December 11, 1978, within the Southern District of California, Virginia Hendricks Bowling, not here charged, and defendant HUMBERTO ROSALES-LOPEZ did wilfully and knowingly conceal, harbor and shield, and attempt to conceal, harbor and shield from detection an alien, namely, Dimas Valdez-Caldera, which alien was not duly admitted by an immigration officer and was not lawfully entitled to enter or reside within the United States, as said defendant then and there well knew; in violation of Title 8, United States Code, Section 1324(a)(3).

COUNT SIX

On or about December 11, 1978, within the Southern District of California, Virginia Hendricks Bowling, not here charged, and defendant HUMBERTO ROSALES-LOPEZ did wilfully and knowingly conceal, harbor and shield, and attempt to conceal, harbor and shield from detection an alien, namely, Victor Rodriguez-Valdez, which alien was not duly admitted by an immigration officer and was not lawfully entitled to enter or reside within the

United States, as said defendant then and there well knew; in violation of Title 8, United States Code, Section 1324(a)(3).

COUNT SEVEN

On or about December 11, 1978, within the Southern District of California, Virginia Hendricks Bowling, not here charged, and defendant HUMBERTO ROSALES-LOPEZ did wilfully and knowingly conceal, harbor and shield, and attempt to conceal, harbor and shield from detection an alien, namely, Armando Valdez-Quintanor, which alien was not duly admitted by an immigration officer and was not lawfully entitled to enter or reside within the United States, as said defendant then and there well knew; in violation of Title 8, United States Code, Section 1324(a)(3).

DATED: February 9, 1979.

A TRUE BILL:

/s/ _____
Foreman

/s/ _____
MICHAEL H. WALSH
United States Attorney

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

(HON. HOWARD F. CORCORAN)

Criminal No. 78-863-1

REQUESTED VOIR DIRE—Filed Feb. 26, 1979

UNITED STATES OF AMERICA, PLAINTIFF,

v.

HUMBERTO ROSALES-LOPEZ, DEFENDANT.

Request for Voir Dire

Pursuant to Rule 24(a), Federal Rules of Criminal Procedure, to provide effective assistance of counsel and to exercise the defendant's right to a trial by an impartial jury, defense counsel expressly requests the opportunity to personally voir dire the prospective members of the jury. Defense counsel expressly agrees to limit his questioning to no more than 30 minutes to make a reasonable inquiry of the background of the prospective members of the jury in order to intelligently exercise his challenges for cause and peremptory challenges. The judge can never adequately probe from the perspective of the defendant. The defense does not object to the Court's general inquiry, but does ask for this opportunity to determine if the jurors are truly sensitive yet unbiased to the issues and persons in this case.

Alternative Request for Questions to be Put to Prospective Jurors

If such request is denied, the defense then requests that the questions listed below are put to each prospective juror to ensure impartiality in the trial of this case and to allow the intelligent and informed exercise of peremptory challenges.

1. Do you or do members of your family or friends know the Honorable Howard F. Corcoran who is the presiding judge in this case? Do any of you know counsel for the prosecution, Irene Takahashi, or counsel for the defense, John J. Cleary, Federal Defenders?

2. Do you or do members of your family know any of the defendants in this case: Humberto Rosales-Lopez, Joe Manuel Flores, David Falcon-Zavala, Jose Humberto Zamora-Moreno, or Virginia Hendricks Bowling?

3. Do you or do any members of your family know any of the following federal agents who may be witnesses in this case: Richard G. Sanders, Robert Page, and Sheldon Grover of the Immigration and Naturalization Service?

4. Do you have any friends or relatives who are connected with any local, state or federal (including military) law enforcement agency or with a prosecutor's office? If you have such friends or relatives connected with law enforcement, have you ever discussed with them guilt or innocence of people charged with violating the law?

5. What are your feelings about the illegal alien problem?

6. Have you ever employed or have friends that have employed illegal aliens?

7. Would you consider the race or Mexican descent of Humberto Rosales-Lopez in your evaluation of this case? How would it affect you?

8. How long have you resided in San Diego County and where do you live?

9. Do you have any difficulty in hearing or seeing, which would include reading?

10. Where do you reside?

11. Where do you work, and what are the nature of your duties? What are the occupation or activities of your spouse? Children?

12. If retired, what was your previous occupation and how long have you been retired?

13. Have you ever worked for the federal government? If so, as what? How long?

14. How many years of formal education have you had?

15. Have you heard or do you have any knowledge about this case that you learned prior to entering this courtroom today? If so, please relate what you heard and from where or whom you heard it?

16. Have you ever been the victim of a crime?

17. Have you, members of your family, or close personal friends ever testified in a criminal trial or before a grand jury? If so, please relate the circumstances.

18. Have you ever sat as a juror in a civil or criminal case? What was the nature of the case and the verdict?

19. Do you know or have you come to know any other prospective juror better than the other jurors in the courtroom this morning?

20. Have you ever discussed your verdict after a trial with the prosecution or defense counsel, witnesses, or parties in the case? If so, what were the circumstances?

21. Do you have any problem accepting the presumption of innocence of the defendant or that the Government must prove the defendant guilty beyond a reasonable doubt?

22. Would the fact that a co-defendant was fugitive influence your evaluation of the case against Humberto Rosales-Lopez?

23. Are you able to speak Spanish? If so, how well? Would you be willing to accept the interpreter's translation?

24. Would you hold it against the defendant who did not testify?

25. Would you feel an obligation to reach a verdict because that was the vote of the majority?

26. If you were on trial, what questions would you put to yourself concerning your ability to be impartial as a juror?

Respectfully submitted,

/s/ _____

JOHN J. CLEARY
Federal Defenders of San Diego, Inc.
Attorneys for Defendant Rosales

Dated: 26 FEBRUARY 1979

[131] *SAN DIEGO, CALIFORNIA, TUESDAY, FEBRUARY 27, 1979, 9:15 A.M.*

(Prior unrelated proceedings.)

* * * * *

(The following proceedings had in open court between court and counsel out of the presence and hearing of the jury:)

MR. CLEARY: Before we call the jury, could I have some of the motions taken care of?

THE COURT: Very well. What motions are open? Anything that has been ruled upon by Judge Thompson—

MR. CLEARY: I don't want to needlessly belabor the Court with that. I am just trying to make sure in the unfortunate event that there is a conviction that my record is clear.

I have tendered to the clerk an original and a copy of the proposed jury instructions, and I would now tender a copy to counsel for the Government. I believe the Court has already received my motion in limine.

* * * * *

[140] THE COURT: Anything further?

MS. TAKAHASHI: Your Honor, are you going to be hearing the matters raised by defense counsel relative to his requested voir dire questions? He has asked the court if he could personally voir dire the jurors.

THE COURT: I will voir dire the jury, and after I voir dire the jury, then I will consider any further requests.

MR. CLEARY: Your Honor, could I have one other comment in the light of action of the Court denying my voir dire? I just covered it in the motion in limine, but I wanted you to be present at the time, that since we would have no contact and no effort to even discuss with a prospective jury member their attitudes, their understanding of the law, or anything of that nature, the Court has exercised its discretion, I am not doubting it, but I feel that some type of preliminary instructions are almost mandated. At least there is footnote references in this Circuit that that is the encouraged practice. I think in this case

that it is essential in light of the fact I have been foreclosed from voir dire.

[141] THE COURT: I think we can handle the instruction at the appropriate time, and I see no necessity in a simple case like this for lengthy preliminary instructions, so I will voir dire the jury. Then we will have a side bar conference as to whether you have any further questions, and you can take exception to the denial.

Is there anything further?

MR. CLEARY: We are ready for the defense, your Honor.

MS. TAKAHASHI: Ready for the Government.

THE COURT: Bring the jury.

THE CLERK: Very well, your Honor. Your Honor, we do have an interpreter present. Do you wish me to swear the interpreter?

THE COURT: Yes.

THE CLERK: Would the interpreter please rise?

(Interpreter duly sworn to translate from the Spanish language to the English language and vice versa.)

(The following proceedings had in open court in the presence of the jury:)

(Jury panel sworn.)

THE COURT: Good morning, ladies and gentlemen. From among your number we are going to impanel a so-called [142] Petit jury to try criminal charges against the defendant who is Humberto Rosales-Lopez.

In order to assure that he has a fair and impartial jury to try the charges against him—can you all hear me? Let me see if I can turn the volume up.

Let me repeat. You can hear me now, I'm sure. In order that this defendant shall have a fair and impartial jury to try the charges against him, it is necessary that we address certain questions to the panel to make sure that there are no underlying prejudices, there are no underlying reasons why you can't sit as a fair and impartial juror if chosen to do so in this case.

Now, in order to have a background for these questions, let me first tell you the nature of this charge against this defendant. He is charged with a conspiracy to harbor and transport aliens here illegally in the United States. He is also charged with the substantive violations of harboring and transporting aliens who are illegally in the United States.

Now, at the outset, let me ask Mr. Humberto Rosales-Lopez to rise and face the jury panel.

(Defendant complies.)

THE COURT: Does anyone know the defendant?

(All jurors answered in the negative.)

THE COURT: Thank you, sir. You may sit down.

(Defendant complies.)

[143] THE COURT: The defendant is represented by Mr. John Cleary of the Federal Defenders Service. Does anyone know Mr. Cleary?

(All jurors answered in the negative.)

THE COURT: The case will be prosecuted on behalf of the Government by Miss Irene Takahashi. Does anybody know Miss Takahashi?

(All jurors answered in the negative.)

THE COURT: Would you introduce the agent at your table, Miss Takahashi?

MS. TAKAHASHI: Yes, Agent Sanders from Immigration Service.

THE COURT: Does anyone know Agent Sanders?

(All jurors answered in the negative.)

THE COURT: Now with that introduction of the people involved and a brief description of the charges, has anyone acquired any knowledge whatsoever of this case by way of newspaper reports or radio reports or television or by any means whatsoever, do any of you have any knowledge whatever concerning this case of this defendant?

(All jurors answered in the negative.)

THE COURT: Certain people who are not on trial in

this case but whose names will be mentioned here as co-conspirators or otherwise are Joe Manuel Flores. Does that name ring a bell with anyone on the panel?

[144] (All jurors answered in the negative.)

THE COURT: David Falcon-Zavala—does that name mean anything to anyone?

(All jurors answered in the negative.)

THE COURT: Jose Humberto Zamora-Moreno—does that mean anything to anyone?

(All jurors answered in the negative.)

THE COURT: Virginia Hendricks Bowling—does anyone know anything about Miss or Mrs. Bowling?

(All jurors answered in the negative.)

THE COURT: The Government may, I don't say that they will, but the Government may call the following persons as witnesses: Richard G. Sanders who is present at the table. You have already had an opportunity to observe him. Mr. Robert Page and Mr. Sheldon Grover of the Immigration and Naturalization Service. Are any of you acquainted in any way or know anything about those persons?

(All jurors answered in the negative.)

THE COURT: Are any of you or any of your close friends or relatives presently employed by any law enforcement agency, national, federal, county or otherwise? Rise and identify yourself.

JUROR ASHER: Roy Asher. I have a son in the San Diego Police Department.

THE COURT: Do you ever discuss his work with him?

[145] JUROR ASHER: No, sir.

THE COURT: Would the fact that your son is a member of a local law enforcement agency incline you to give more credence to the testimony of a law enforcement agent than to other persons?

JUROR ASHER: No, sir.

THE COURT: Anybody else have any?

JUROR RAMSEY: My husband is a juvenile probation officer.

THE COURT: Identify yourself.

JUROR RAMSEY: Julie Ramsey.

THE COURT: Federal probation officer?

JUROR RAMSEY: County.

THE COURT: Would that in any way affect your acceptance of testimony of one kind of another?

JUROR RAMSEY: No, sir.

THE COURT: Do you think you could sit as a fair and impartial juror?

JUROR RAMSEY: I can.

THE COURT: Anyone else? Yes, identify yourself.

JUROR REESE: Robert Reese. I have a brother-in-law who is a PR man with the San Diego Police Department.

THE COURT: Would that affect your judgment in accepting testimony from one person or another?

JUROR REESE: Not at all; no, sir.

[146] THE COURT: Now, this case, as I have already announced, involves aliens alleged to be illegally in the United States. Do any of you have any feelings about the alien problem at all? Is there anything about it that would cause you to—yes, ma'am?

JUROR ROSA: My name is Palos De La Rosa. It is just a name that they use for the people to transport illegal aliens and place them intentionally—

THE COURT: Very well. You may be excused. Would you return to the jury lounge, please.

Identify yourself.

JUROR HAMPTON: Sam Hampton. The defendant looks very familiar to me, and that is about all. You asked the question awhile ago, but he looks very familiar to me.

THE COURT: Would you take a good look at him and tell us whether or not you do know him?

JUROR HAMPTON: He looks very familiar. I really wouldn't say.

THE COURT: Would the fact in any way, if it is a fact, interfer with your verdict as a fair and impartial juror?

JUROR HAMPTON: It might be.

THE COURT: It might be.

Let me again ask the general question: Do any of you have any particular feelings one way or the other about [147] about aliens or could you sit as a fair and impartial juror if you are called upon to do so?

In the back row?

JUROR SKELLY: Kristine Skelly, and I have mixed feelings about it. I don't think I could be impartial. I have a tendency to feel—my own feelings, I don't think I could be a fair juror.

THE COURT: Very well, you will be excused. Would you return to the jury lounge, please?

Do any of you have trouble hearing? Do any of you have poor eye sight where you wouldn't be able to read documents if documents were introduced into evidence?

(All jurors answered in the negative.)

THE COURT: Do any of you have physical impairment that would prevent you from continuing with this case for a day or two?

JUROR SCHEUFLER: Bill Scheufler and I have a doctor's appointment at 1:15 tomorrow.

THE COURT: You have a doctor's appointment when?

JUROR SCHEUFLER: 1:15 tomorrow afternoon.

THE COURT: Is it urgent?

JUROR SCHEUFLER: It would be important that I would be there, yes.

THE COURT: All right. You will be excused.

Has any member of the prospective panel had a [148] legal education? Identify yourself.

JUROR WATERFORD: Robert Waterford. I am a retired lawyer.

THE COURT: Did you practice criminal law?

JUROR WATERFORD: I was assistant corporate attorney for the City of Chicago prosecuting building violations of the building code.

THE COURT: Would you be able to accept the instructions of the court as to the law that's applicable to this case notwithstanding any previous experience you had in the field of law?

JUROR WATERFORD: Yes, your Honor, I would.

THE COURT: Thank you. Anyone else have a legal education of any kind? Have you worked in a law office, for example, and brushed against the law?

JUROR SULLINS: Yes, sir.

THE COURT: Identify yourself.

JUROR SULLINS: Harold Sullins. I spent three years as court liaison between the military and the South Bay courts of Chula Vista, El Cajon, and National City.

THE COURT: In view of that experience, would you be able to accept the instructions of the court?

JUROR SULLINS: Yes, sir.

THE COURT: And not try to associate your previous experience in any way?

[149] JUROR SULLINS: Yes, I believe I could.

THE COURT: Thank you.

Do any of you have any quarrel with a precept of our system of criminal jurisprudence to the effect that a defendant is presumed to be innocent and that that presumption attaches throughout the whole trial. Do any of you have any quarrel with that concept?

(All jurors answered in the negative.)

THE COURT: I think we will stop the general questioning there. Would you fill the jury box, Mr. Clerk?

THE CLERK: Very well, your Honor. Ladies and gentlemen, as I call your name, would you please take a seat in the jury box.

Do you wish me to call for one alternate, your Honor?

THE COURT: Yes.

THE CLERK: Very well, your Honor.

Juror No. 26, Marcia Lemmon;
No. 15, Raymond Green;
No. 44, Oren Thomas;
No. 22, Loraine Howell;
No. 35, Vicky Peynado;
No. 12, Dennis Frye;
No. 47, Robert Waterford;
No. 14, Geneva Glenn;
[150] No. 11, Doniphan Frazee;
No. 9, Barbara Donnelly;
No. 20, Naomi Henion;
No. 10, Denis Doran;
No. 42, Dorothy Stark;
No. 2, Roy Asher;
No. 1, Isamu Akamatsu;
No. 43, Harold Sullins;
No. 17, Marcella Harder;
No. 37, Robert Reese;
No. 18, Eileen Kennedy;
No. 4, Diane Canterbury;
No. 33, John O'Leary;
No. 31, Bette Nichols;
No. 5, Sondra Cover;
No. 48, John Workman;
No. 8, Harve Dolen;
No. 28, Katherine May;
No. 24, John Kleeb;
No. 45, Kenneth Veatch;
No. 30, Kathern Muller;
No. 38, Gladys Ritchie;
No. 46, Kathleen Waller.

THE COURT: In a moment I am going to ask questions of the first 31 names called. Let me address one or two [151] questions to the panel as a whole.

I am informed that this case will take two days. Is it going to seriously inconvenience anyone on the panel if it goes two days or even into three days?

JUROR Green: Ricky Green. I am taking a trip tomorrow to San Francisco and New York City, a business trip.

THE COURT: There is no way you can postpone it?

JUROR GREEN: No, sir.

THE COURT: Very well. You will be excused, and would the gentleman sitting in the corner take his place?

THE CLERK: Just a minute, sir. I will have to call one more name to put him in the box.

Juror No. 39, Lana Sallaz.

THE COURT: Then just one further general question addressed to the whole venire, the whole panel.

Does any reason occur to anyone of you why you could not sit in this case as a fair and impartial juror, any reason whatsoever? I assume that the answer is no.

Very well then. Let me now address the individual jurors beginning with you, ma'am, as number one. Would you rise? Then we will take them in order.

Would you give us your name; your occupation; your husband's occupation if any; if you are retired, what your previous occupation was; and how long you have been a resident of San Diego.

[152] JUROR LEMMON: My name is Marcia Lemmon. I work in sales in a dress shop; I'm a widow; my husband was an industrial roofing consultant; and I have been in San Diego since 1964.

THE COURT: Thank you. Next?

JUROR SALLAZ: My name is Lana Sallaz; I am employed by the Naval Oceans Systems as a computer technician; I have been in San Diego six years; I am single.

JUROR THOMAS: Oren E. Thomas; I have been in California 54 years in October, your Honor; United States Navy Chief Petty Officer, Chief Boilermaker, retired; and with the United States Civil Service 23 years.

THE COURT: Thank you.

JUROR HOWELL: Loraine Howell; I have been in San Diego since 1967; my husband is retired; he was a hydraulic engineer in New York State.

JUROR PEYNADO: My name is Vicky Peynado; and I am a supervisor at the Naval Supply Center; my husband works for Maynard's Electroplater and we have been here since 1967.

JUROR FRYE: My name is Dennis Frye; resided in San Diego about three years; work in data processing; my wife is a homemaker.

JUROR WATERFORD: My name is Robert Waterford; I stated previously that I am a retired lawyer; I've lived in San Diego for the past six years; married; my wife is not employed.

[153] JUROR GLENN: My name is Geneva Glenn; I have lived in Chula Vista 15 years; I am employed in San Diego at Mercy Hospital; my husband was in the Marine Corps.

JUROR FRAZEE: My name is Doniphan Frazee; I have lived in San Diego 30 years; I'm a PBX installer with Pacific Telephone; my wife is a homemaker.

JUROR DONNELLY: My name is Barbara Donnelly; I was born in San Diego; I am a materiel expediter for Southwest Marine; and I was formerly married to a school teacher and now divorced.

JUROR HENION: My name is Naomi Henion, and I'm retired from Civil Service from the Air Force; I was with the Inspector General's office; and I have been—I am a widow. My husband was killed in World War II; and I have lived here in San Diego four years.

JUROR DORAN: My name is Denis Doran; I have lived in San Diego County for about 25 years; my wife is a licensed vocational nurse, not working at this time; I am a PBX installer with Pacific Telephone.

JUROR STARK: My name is Dorothy Stark; I have lived in San Diego 36 years; I am a retired medical technician; and I'm a widow.

JUROR ASHER: I'm Roy Asher; retired from the Navy; lived in this area, Chula Vista, since 1963, 16 years; I am married; my wife is a housewife.

[154] JUROR AKAMATSU: My name is Isamu Akamatsu; my wife and I have lived in San Diego seven years; I am a senior systems analyst for a data processing machine manufacturer; my wife works for Mesa College.

JUROR SULLINS: Harold Sullins; I am retired Navy; also retired Civil Service; my wife is retired also; I have maintained a home in San Diego since 1947.

JUROR HARDER: Marcella Harder; we moved here from Omaha, Nebraska, to San Marcos three years ago; my husband is retired from the Burlington Railroad; I am retired from Western Electric.

JUROR REESE: Robert Reese, a native son, transport driver for Arrowhead Water; my wife's a homemaker.

JUROR KENNEDY: Eileen Kennedy; we have lived in San Diego since 1962; I am a pharmacist at the Naval Supply; my husband is a salesman.

JUROR CANTERBURY: My name is Diane Canterbury; I have lived in San Diego about eight and half years; I am a homemaker; my husband and I are owners and operators of two McDonald's Restaurants in San Diego.

JUROR O'LEARY: My name is John O'Leary; I am retired from the Air Force; I have lived in San Diego since 1937; 20 years in the service; I am presently employed as a computer specialist for the Navy; my wife is a homemaker.

JUROR NICHOLS: My name is Betty Nichols; I am employed by [155] Physician's Supply Company, I am a buyer for the uniform stores; my husband is a machinist at North Island; we have lived in San Diego 31 years.

JUROR COVER: Sondra Cover; I am a homemaker; my husband is a self-employed architect in San Diego; we have lived here seven years.

JUROR WORKMAN: John Workman; I work for Food Basket; single; lived in San Diego 23 years.

JUROR DOLEN: My name is Howard Dolen; I have lived in Carlsbad for the last 20 years; I'm retired, two and a half years ago; before that I was maintenance in apartments; prior to that I was a dispatcher for the Yellow Cab Company, Oceanside.

JUROR MAY: Katherine May, widow, housewife; I have lived in San Diego six years.

JUROR KLEEB: John Kleeb; I am a construction project manager; my wife is a teacher's assistant; and I have lived in Cardiff five years and San Diego two years, seven years in California total.

JUROR VEATCH: My name is Kenneth Veatch; production foreman at Naval Steamship Building; I've lived in the San Diego area 21 years; recently divorced.

JUROR MULLER: Katherine Muller; I have lived in the San Diego area 46 years; I am an ex-library technician.

JUROR RITCHIE: My name is Gladys Ritchie; I work for [156] American Airlines; I have lived in San Diego since 1960; my husband works at North Island, Civil Service.

JUROR WALLER: My name is Katherine Waller; I am employed by Grayline Tours, customer service; I have lived in San Diego six years.

THE COURT: May I ask counsel to approach the bench?

(The following proceedings had at sidebar out of the hearing of the jury.)

THE COURT: Anything further?

MR. CLEARY: Yes, your Honor, I have, of course, submitted to the Court my extensive list of requested questions, and I know I haven't been given the opportunity of voir dire, and I feel to at least preserve my concept of the impartial jury and explore the background on challenges and peremptory challenges, the following questions would be given, and I would like the opportunity to state the reasons why the particular questions should be asked: The Court has not asked whether or not anyone has employed aliens or illegal aliens, and I think the Court has heard—

THE COURT: I think they have a constitutional right.

MR. CLEARY: They shouldn't serve on the jury, then.

THE COURT: That is something else.

MR. CLEARY: I feel we have a restaurant owner—that makes it a fair question.

THE COURT: Motion denied.

[157] MR. CLEARY: The next question as to Mexican descent or race of my client, I think it is Aldredge, 1898, and notwithstanding the Supreme Court decision as to state cases, clearly in a federal case, the Court must explore all racial antagonism against my client because he happens to be of Mexican descent.

Further, I am at a substantial disadvantage in trying to exercise my challenges for cause, or peremptory challenges, unless I have the manifest as to federal employment and also the question taken out is whether or not the jurors might have some feelings for the Federal Government. I think several indicate Civil Service, certain others I don't know whether they work for the Federal Government or not. Although I think Chief Justice Hughes back in the '30s held government employees could serve, I feel I am entitled to explore whether or not they have had government service.

I have asked, "Have you ever been a victim of a crime?", which the Court didn't ask. This was very critical, I think, in the last jury the Court just had where one of the voir dire questions elicited the fact that a person on the panel had been robbed in another county by illegal aliens. If the juror has been the victim, it is pertinent that I know that.

Further, I feel I am entitled to know whether [158] jurors have prior jury experience, whether federal or state court. I feel that is an avenue of inquiry not revealed. Also, the Court was kind enough to ask about the presumption of innocence, but the concomitant part of the question that they understand the Government's burden to prove evidence beyond a reasonable doubt, I think, is also essential in trying to allay any fear of them understanding that the defense has to prove nothing.

I think the question as to whether or not any of the jurors speaks Spanish is pertinent. The Court swore the interpreter, and I think it is reasonable to assume that

there will be Spanish translation throughout the proceeding and it would be important to the defense if any of them does speak Spanish. I feel although the Court might rule that, certainly I wouldn't want to exclude people who might speak Spanish, I am entitled to that question.

Also, I felt that the question concerning any comment against the defendant who might not testify, I think that should be explored upfront. The Supreme Court recently held the Court had discretion as to whether or not to give an instruction dealing with the fact a defendant failed to testify. In that case, the Court held that—

THE COURT: That's in final instructions.

MR. CLEARY: That's right. I am asking if this jury might feel so, that I can properly probe that area. I feel that this is just the miniscule—

[159] THE COURT: I felt I have made your record. I will stop right there. Well—I will stop right there. Do you have anything?

MS. TAKAHASHI: No, your Honor.

THE COURT: You will have to have six and sixteen peremptories. Is it going to satisfy your alternates?

(Off the record discussion between the Court and the Clerk.)

THE COURT: All right. They have all heard the questions I will have them identify themselves after you call them.

(The following proceedings had in open Court in the presence and hearing of the jury:)

THE CLERK: Ladies and gentlemen, I will call three more names. As I call them, would you be seated in the first three seats directly behind the lady in the brown curduroy coat, please?

No. 21, William Hooks;

No. 23, Frances Kaddah;

No. 3, Robert Bordelon.

THE COURT: Beginning with Mr. Hooks, Mr. Hooks, would you rise, identify yourself and give us the answer to those other questions we asked of the jurors, as to your

occupation, how long you have been in San Diego County; if you are retired, what your previous occupation was.

JUROR HOOKS: William Hooks; retired; I have been in [160] San Diego 35 years; I was in the airline business 28 years.

JUROR KADDAH: My name is Frances Kaddah; I live in Brawley in the Imperial Valley; I have lived there about two years; I am a housewife is all; and I have been a school teacher in the past; my husband is a soil consultant.

JUROR BORDELON: I am an NC programmer with an aerospace company; I have lived here 38 years; my wife is a homemaker.

THE COURT: Would counsel then exercise their strikes?

(Counsel exercise their strikes using the Arizona system, after which the following proceedings are had, to-wit:)

THE CLERK: Ladies and gentlemen, as I call your name, the gentleman here in the tan suit will seat you in the box in the proper seat.

No. 1, Marcia Lemmon;
No. 2, Loraine P. Howell;
No. 3, Dennis C. Frye;
No. 4, Geneva Glenn;
No. 5, Doniphan Frazee;
No. 6, Dorothy C. Stark;
No. 7, Isamu Akamatsu;
No. 8, Marcella Harder;
No. 9 Eileen Kennedy;
No. 10, John Workman;
[161] No. 11, Katherine A. May;
No. 12, John J. Kleeb; and
Kathern Muller and Gladys Ritchie, alternates.

Your Honor, the panel and the alternates have been seated.

THE COURT: Would you swear the jury?

THE CLERK: Yes, your Honor. Would you all stand and raise your right hands?

(Jury sworn.)

(Remaining jurors excused.)

THE COURT: Ladies and gentlemen, before we begin the trial, we will take a short recess. Let me first give you one or two admonitions that will carry throughout the whole trial.

No. 1, during the course of the trial, don't discuss the case with anyone and don't let anyone try to discuss the case with you. And that means as well that you shouldn't discuss the case among yourselves until the case is finally submitted to you for your final verdict. If anyone does accost you or try to talk about the case, report it to the Court immediately, and we will take whatever steps are necessary.

We have had some problems lately about smoking in the jury room. I am leaving that entirely to the discretion of the jurors as to how you work out your problems, but [162] there is a small room there for witnesses, and you may use that if you wish, and isolate the smokers from the non-smokers. You handle your own problem on that.

I think that's it for the moment. We will take a ten-minute recess.

* * * * *

[Testimony of Virginia Bowling.]

[360] Q. You referred to him as "Chuy," is that a nickname?

A. Yes, I guess.

Q. Do you know what his true name is?

A. Jesus something. I don't know his real last name.

Q. How do you know him?

A. I worked with Chuy.

Q. Did he ever live in your home at 1120 Fern Street, Imperial Beach?

A. Yes, he did.

Q. And how did that come to be?

A. He was dating my daughter.

Q. And when did he start living at your house?

A. About the 1st of July.

Q. July of 1978?

A. Right.

[361] Q. Did he ever contribute to the rent, utilities or food during the time he lived there?

A. Not actually, no.

Q. Could you explain that?

A. He didn't have his own money; no.

Q. Does he speak any English that you know?

A. Yes.

Q. Do you speak any Spanish?

A. No, I don't.

* * * * *

[366] Q. Now this yellow Charger with a license plate of DR-551, whose car is that?

A. That's my daughter's, Kim.

Q. Was that ever used in alien smuggling activities?

A. Yes, it was.

* * * * *

[368] Q. After you crossed the San Clemente checkpoint,—by the way, why would you be driving the car containing aliens through the San Clemente checkpoint?

A. Why would I?

Q. Yes.

A. For money, and because I was American, I could make it.

Q. Could you explain that just a little bit more?

A. They don't check American people, and I would always have somebody with me, as much as they do Mexican people.

* * * * *

[370] Q. Then do you know what would happen after that?

A. As far as I know, the guides take them through the hills and down to the car waiting.

Q. Now, how would a car that is waiting get there?

A. Chuy. He would drive up and I would follow him and bring him back home or Kim would follow him and then he would wait to see if they make it.

* * * * *

[377] Q. Did you tell him who Chuy was?

A. I told him Chuy was Kim's boyfriend.

Q. Was it her boyfriend or husband, do you recall?

A. He is her boyfriend.

Q. Do you remember what you told Investigator Sanders?

A. Well, the way the young kids are today, I never know whether they are husbands or what they are. I'm sorry.

* * * * *

[381] Q. Does your daughter use the phone regularly?

A. My daughter doesn't even live with me, my older daughter.

Q. Oh, I see, your younger daughter?

A. Right.

Q. How many children do you have?

A. Three.

Q. Who are they?

A. Deborah, Patrick and Kim.

Q. How old is Deborah?

A. 28. Patrick is 25 and Kim is 19.

Q. And of those adult children, which live with you?

A. Kim.

Q. And how long has she lived with you?

A. 19-½ years.

* * * * *

[382] A. I don't recognize the phone numbers, but Kim used to call Chuy all the time in L.A. They used to check on each other.

Q. And when did Kim meet Chuy?

A. In January.

Q. Of 1978?

A. Right.

Q. And how long had she gone with him before he moved in with you?

A. He didn't move in until about the 1st of July.

Q. Now, they were pretty close at that time; is that a fair statement?

A. Very close at one time.

Q. Are they close now?

A. Well, he's here, and she's there.

Q. By that you mean?

A. He has telephoned her quite often from MCC to my [383] house, yes.

Q. Now, do you have anybody else there at that house besides yourself and Kim at the present time?

A. I sure do, my granddaughter.

Q. Do you have anyone else?

A. No.

Q. Now, who is Javier?

A. The man I work for.

Q. You are a United States citizen; is that correct?

A. I'm American.

Q. You are a United States citizen also?

A. I was borned here, yes.

* * * * *

[397] Q. And what were the circumstances of how your daughter met?

A. My daughter met?

Q. Yes. How your daughter, Kim, met Humberto.

A. You want me to tell you her lovelife?

Q. No.

A. Because that's the way it will have to happen.

Q. No. How did they meet? Did he come to your place or did she go up?

A. She met him at Javier's house.

* * * * *

[407] Q. How long has your daughter lived with you?

A. 19-½ years. I think I told you that.

Q. All that time she has remained with you, she hasn't left home at any time?

A. No.

Q. And Chuy moved in and lived with her commencing the first of July, 1978; is that correct?

A. Right.

Q. And was he on good terms with her up until the time of his arrest?

A. They said they were in love. I don't know.

Q. And during that time that you knew Chuy from the first of January on, and then when the —approximately five months he stayed with you at your house as your daughter's consort, you never knew his full name?

A. I've heard two different names, but now I don't know what his name is.

As far as I am concerned, Chuy is a nice person. He has always treated me nice and he has always been a nice person. I'm sorry I can't say anything bad about him.

[408] Q. What you are saying is not bad about him?

A. I'm not saying—I'm guilty, too. We are guilty. We are guilty.

Q. Chuy used you. Is that a fair statement?

A. No. Chuy didn't use me and I didn't use Chuy. Nobody used nobody. We worked together.

Q. When Chuy was there with you, didn't you or your daughter provide him with food or other subsistence with which to live at your house?

A. Whatever was there in the house, he was welcome to it, as so many of my kid's friends were.

Q. In other words, he was living off your largess; is that correct?

A. I never considered people—if I had something to give—living off me, because I never considered that living off me.

Q. My point is, generally you were kind enough to support him while he stayed with you?

A. I didn't consider myself supporting him. He stayed with Kim. They were together. They were going to get a place eventually. I never considered him living off me. I don't know why they say that.

Q. To your knowledge, did he own any automobiles?

A. The silver Torino and part of the van.

Q. But he didn't have his name on the pink slip?

[409] A. Neither do I.

Q. But who had the money?

A. Both of us.

Q. Who paid the rent?

A. I did.

Q. Do you have a bank account?

A. No, I don't. I wish I did.

* * * * *

[410] Q. Now, when you told the agents you didn't know who Humberto Rosales-Lopez was—you did that because—

A. I absolutely did not know who he was. I did not know. I didn't know who they were talking about. They can tell you that themselves. I looked very stupid, I guess, but I did not know who they were talking about. The green cards are all fake anyway. You never know who's who.

Q. Has your daughter ever run any illegal aliens?

A. Kim?

Q. Yes.

A. You will have to ask her about that.

Q. Do you know?

A. I don't know a great deal about my daughter. My daughter is a "junkie." She is a heroin user, and I have been fighting for four years with her. I don't know a great deal she does except try to help her.

United States District Court

FOR THE
SOUTHERN DISTRICT OF CALIFORNIA

No. 78-0863-Criminal

UNITED STATES OF AMERICA

v.

HUMBERTO ROSALES-LOPEZ (1)

JUDGMENT AND COMMITMENT—Entered Apr. 3, 1979

On this 2nd day of April, 1979 came the attorney for the government and the defendant appeared in person and[1] by counsel, John Cleary, of Federal Defenders.

IT IS ADJUDGED that the defendant upon his plea of[2] not guilty and a verdict of guilty has been convicted of the offense of conspiracy to conceal, habor and shield, and illegally transport aliens in violation of 18 USC 371 and 8 USC 1324 as charged in count 1; aiding and abetting the illegal transportation of aliens in violation of 8 USC 1324(a)(2) and 18 USC 2 as charged in each of counts 2, 3 and 4; and concealing, harboring and shielding aliens in violation of 8 USC 1324(a)(3) as charged in each of counts 5, 6 and 7 of the indictment in 7 counts and the Court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that on counts 1 through 7 the defendant is guilty as charged and convicted.

IT IS ADJUDGED that on count 1 the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of eighteen (18) months.

IT IS ADJUDGED that on each of counts 2 through 7, to run consecutive to each other and consecutive to count 1

the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of five (5) years. Execution of sentence as to counts 2 through 7 only is suspended and the defendant is placed on probation for a period of five (5) years on condition that he obey all laws, federal, state and municipal, that he comply with all lawful rules and regulations of the probation department, that he not be found in the company of anyone who is not legally entitled to be in the United States, that he not have any false documents in his possession, that he not enter the United States without proper documents and that if he enters the United States, he report to the probation office.

IT IS ORDERED that probation supervision is waived if the defendant is deported and while he remains in Mexico.

IT IS FURTHER ORDERED that the underlying indictment in this case is hereby dismissed.

/s/ _____

GORDON THOMPSON JR.
United States District Judge
Filed: April 2, 1979

WILLIAM W. LUDDY
Clerk

/s/ _____

By: V. C. MOHLER,
Deputy

United States Court of Appeals,
Ninth Circuit.

No. 79-1302.

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE,

v.

HUMBERTO ROSALES-LOPEZ, DEFENDANT-APPELLANT.

OPINION—March 20, 1980.

Rehearing Denied May 12, 1980.

John J. Cleary, Federal Defender, San Diego, Cal., for defendant-appellant.

Irene Takahashi, Asst. U.S. Atty. (on the brief), Michael H. Walsh, U.S. Atty., Irene Takahashi, Asst. U.S. Atty. (argued), San Diego, Cal., for plaintiff-appellee.

Appeal from the United States District Court for the Southern District of California The Honorable Howard F. Corcoran, Presiding.

Before WALLACE and ANDERSON, *Circuit Judges*, and PALMIERI,* *District Judge*.

J. BLAINE ANDERSON, *Circuit Judge:*

Defendant Humberto Rosales-Lopez appeals his conviction below for one count of conspiracy to conceal, harbor and shield, and illegally transport aliens in violation of 18 U.S.C. § 371 and 8 U.S.C. § 1324, three counts of aiding and abetting the illegal transportation of aliens in violation of 8 U.S.C. § 1324(a)(2) and 18 U.S.C. § 2, and three counts of concealing, harboring and shielding aliens in violation of 8 U.S.C. § 1324(a)(3). Rosales-Lopez was sentenced to serve five years for each count, with each sentence to run consecutively, but the sentences for each of the last six counts were suspended. We affirm on all issues.

*The Honorable EDMUND L. PALMIERI, Senior United States District Judge, Southern District of New York, sitting by designation.

I. *BACKGROUND*

Rosales-Lopez, a resident alien, was involved in an illegal alien smuggling operation in Southern California. Briefly stated, the object of the plan was to transport aliens who had surreptitiously crossed the Mexican-American border from a point in Imperial Beach, California, by automobile up Interstate Five to a drop point in Los Angeles. Rosales-Lopez' conviction in December 1978, arises from his arrest for the transportation of three Mexican aliens from Imperial Beach to Los Angeles.

The three aliens, led by a guide whose identity remains unknown, left Tijuana on foot and crossed the border under cover of darkness. The guide took them to a car parked on the American side of the border, and drove them to the residence of Virginia Hendricks Bowling in Imperial Beach. Bowling, an American citizen, lived at the Imperial Beach residence with her daughter. Sometime in July 1978, Rosales-Lopez had become romantically involved with Bowling's daughter and had moved into the Imperial Beach residence. When the three aliens whose entry is at issue here arrived early on the morning of December 11, Rosales-Lopez admitted them, along with the guide, into the garage of the Bowling house.

The method of transporting the aliens apparently conformed to a plan which had been followed on previous occasions. The guide and the aliens entered the trunk of a green Oldsmobile, and Rosales-Lopez closed the lid of the trunk. Bowling then entered the Oldsmobile and drove it north on Interstate Five through the San Clemente checkpoint, with Rosales-Lopez following in a grey Ford. Once both automobiles had cleared the checkpoint, they pulled off into a parking lot and Bowling exchanged cars with Rosales-Lopez. The guide emerged from the trunk of the Oldsmobile and proceeded to drive to Los Angeles, with Rosales-Lopez seated on the passenger side. The purpose of Bowling driving the car through the checkpoint was to deter suspicion by avoiding the use of a Latin-appearing driver. Bowling returned to Imperial Beach in the Ford, following the exchange of cars.

The Oldsmobile was driven to an apartment in Los Angeles, where the aliens were let out of the trunk and told by Rosales-Lopez to go upstairs into the apartment. The apartment was apparently occupied by a number of other illegal aliens who had been transported to the location by other means. Sometime after the arrival of Rosales-Lopez, the guide, and the three aliens, the other named principals in the smuggling arrangement, David Falcon-Zavala and Joe Manuel Flores, arrived at the apartment, apparently under orders from a person higher up in the smuggler's chain of command. Falcon-Zavala and Flores were to be involved in the transportation of the numerous aliens present at the apartment to specific locations in Southern California which were the aliens' ultimate destinations.

Agents of the Immigration and Naturalization Service had been maintaining surveillance over both the Los Angeles apartment and the Imperial Beach residence for a number of weeks prior to December 11. In fact, agents had followed the progress of the green Oldsmobile from Imperial Beach to Los Angeles that morning. Agents had observed Rosales-Lopez open the trunk of the Oldsmobile at Los Angeles, and had also observed the aliens leave the trunk and proceed up the stairs. In addition, automobile traffic around the apartment had been heavy. The agents concluded that the apartment was being used as a drop site for illegal aliens.

At approximately noon on December 11, Flores departed in an automobile with two of the aliens. Agents stopped the Flores car a few blocks away and obtained admissions from the aliens that they were present in the United States illegally. A short time later, Rosales-Lopez, Falcon-Zavala, and one of the aliens who had been transported in the trunk of the Oldsmobile left the apartment in another automobile. Agents approached the car while it was stopped at a gas station. All three occupants were arrested. A short time later, agents raided the apartment, and all of the aliens present were taken into custody.

Rosales-Lopez, Flores, Falcon-Zavala, and Bowling were originally indicted on sixteen counts of conspiracy,

harboring and shielding aliens, aiding and abetting, and illegal transportation of aliens. Falcon-Zavala and Bowling each plead guilty to misdemeanors. Flores became a fugitive whose whereabouts apparently remain unknown. A superseding indictment filed February 9, 1979, charged Rosales-Lopez and Flores with seven counts of conspiracy, concealing and harboring, illegal transportation, and aiding and abetting. Rosales-Lopez was convicted and sentenced on each count. Procedural details will be developed as necessary in the opinion.

II. *ISSUES ON APPEAL*

Rosales-Lopez raises seven issues on appeal:

(1) Whether the district judge's voir dire of the jury venire was adequate to detect potential bias or prejudice;

(2) Whether the trial court erred in refusing to provide Rosales-Lopez, an indigent, with a free copy of the transcript of a suppression hearing;

(3) Whether sentencing was improperly imposed by a district judge who did not preside at trial;

(4) Whether the district court erred by denying Rosales-Lopez an evidentiary hearing on possible prosecutiorial vindictiveness;

(5) Whether the district court erred in refusing to give an instruction on a lesser-included offense;

(6) Whether consecutive sentences were improperly imposed;

(7) Whether the exemption from prosecution for employers contained in 8 U.S.C. § 1324 denies Rosales-Lopez equal protection of the laws.

III. *VOIR DIRE*

Pursuant to the "Arizona Plan" utilized in the Southern District of California, the trial judge conducted the voir dire of the jury venire. Counsel for Rosales-Lopez submitted several requested questions to the court prior to voir dire, a number of which the judge declined to ask.

Rosales-Lopez claims reversible error in the court's failure to make six specific inquiries.

We affirm as to five of the six with only brief comment.[1] The scope of voir dire is a matter within the sound discretion of the trial judge, and will not be disturbed on appeal unless the procedures used or questions propounded are so unreasonable as to constitute an abuse of discretion. *United States v. Baldwin*, 607 F.2d 1295 (9th Cir. 1979). After reviewing the entire voir dire procedure, we cannot say that the questions propounded were insufficient to probe for bias. We find no error generally in the refusal to ask five of the six questions.

Rosales-Lopez also requested that the court inquire whether his Mexican descent would affect the jurors' deliberations.[2] While we also affirm on this question, we feel that a more extended discussion is in order. A longstanding rule of criminal justice in the federal courts holds that questions regarding possible racial prejudice should be put to the venire in prosecutions of minority defendants, at least where "special circumstances" indicate that the defendant's race may be a factor in the trial. *See Ristaino v. Ross*, 424 U.S. 589, 96 Ct. 1017, 47 L.Ed.2d 258 (1976); *Aldridge v. United States*, 283 U.S. 308, 51 S.Ct. 470, 75 L.Ed. 1054 (1931). The extent of the federal rule is unclear. Some circuits have applied what amounts to a *per se*

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[1] The five requested questions were phrased as follows:

"6. Have you ever employed or have had friends that have employed illegal aliens?"

"13. Have you ever worked for the federal Government? If so, as what? How long?"

"16. Have you ever been a victim of a crime?

"18. Have you ever sat as a juror in a civil or criminal case? What was the nature of the case and the verdict?"

"23. Are you able to speak Spanish? If so, how well? Would you be willing to accept the interpreter's translation?"

[2] The question as submitted read:

"7. Would you consider the race or Mexican descent of Humberto Rosales-Lopez in your evaluation of this case? How would it affect you?

rule that a racial prejudice question must be put to the venire in all cases where the defendant is a member of a minority group. See, *e.g.*, *United States v. Bowles*, 574 F.2d 970 (8th Cir. 1978); *United States v. Bell*, 573 F.2d 1040 (8th Cir. 1978); *United States v. Robinson*, 485 F.2d 1157 (3d Cir. 1973). Our circuit, however, has declined to impose such a voir dire requirement upon district courts absent some indication that prejudice is likely to arise, or that the trial will have racial overtones. *See United States v. Perez-Martinez*, 525 F.2d 365 (9th Cir. 1975); *United States v. Walker*, 491 F.2d 236 (9th Cir.), *cert. denied*, 416 U.S. 990, 94 S.Ct. 2399, 40 L.Ed.2d 768 (1974).

Under the principle of stare decisis, we are constrained to follow our holding in *Perez-Martinez*, *supra*, unless a subsequent decision of this court or of the United States Supreme Court has altered its basic principle. The Supreme Court addressed the question after our decision in *Perez Martinez* in *Ristaino v. Ross*, *supra*, a state prosecution of a black defendant charged with an assault upon a white security guard. In determining that there is no constitutional compulsion upon state courts to inquire into racial prejudice on voir dire, the Court noted that the duty imposed upon federal courts under the Court's supervisory power is much broader:

> "Although we hold that voir dire questioning directed to racial prejudice was not constitutionally required, the wiser course generally is to identify racial prejudice if required by the defendant. Under our supervisory power we would have required as much of a federal court faced with the circumstances here."

424 U.S. at 597 n.9, 96 S.Ct. at 1022 n.9.

We do not find that *Ristaino's* cryptic reference to the federal rule requires that we disregard *Perez-Martinez*. While the Court found that there was not a "significant likelihood that racial prejudice might infect Ross' trial," 424 U.S. at 598, 96 S.Ct. at 1022, we note that the facts of *Ristaino* presented a greater likelihood of prejudice than do the facts of the present case. At least one other circuit has arrived at a similar conclusion in its interpretation of *Ristaino*. See *United States v. Polk*, 550 F.2d 1265 (10th

Cir.), *cert. denied*, 434 U.S. 838, 98 S.Ct. 129, 54 L.Ed.2d 100 (1977). Accordingly, we hold that the Mexican heritage of Rosales-Lopez did not, in and of itself, require the court below to pose a question on racial prejudice to the venire.

We also find no circumstances in the record indicating that racial prejudice was likely to arise at trial. Perhaps the greatest potential for prejudice arose from the charge of harboring and transporting illegal aliens in a locality where the problem of illegal alien entry is a particularly sensitive issue. The trial judge, however, inquired into the feelings of the jurors on the illegal alien problem, and two jurors were excused on that basis. We find that the voir dire in this case adequately probed the venire for potential bias on all issues.

IV. *TRANSCRIPT OF SUPPRESSION HEARING*

In the course of his pre-trial motions, Rosales-Lopez moved to suppress certain evidence, and Judge Thompson conducted an evidentiary hearing on February 5, 1979. At the close of the hearing, counsel for Rosales-Lopez moved to obtain a copy of the hearing transcript at government expense on the ground that his client was indigent. Judge Thompson denied the motion to provide the transcript and, though the record here is ambigious,[3] apparently re-

[3]The following exchange took place between defense counsel and Judge Thompson at the close of the hearing:

> "Mr. Cleary: The reason I mentioned that was there is some indication, and I didn't raise those points here, concerning certain aspects of conduct, and at least the stated intention of the government to seek reindictment in this because of some of the defects in my pleadings. The one thing I would like to preserve at this time is a motion at this time for a transcript of these proceedings so that in the event of trial, which is now anticipated, I would have the opportunity for effective cross-examiantion—I only have my seven pages of notes—which is in *Britt v. North Carolina*, the requirement of keeping adequate notes to effectively cross-examine and confront what I assume will be two adverse witnesses at the time of trial.
>
> "The Court: Those matters and matters of discovery, I'm not going to order any transcript relative to this hearing at all.

ferred the matter to the magistrate. On February 13, Magistrate Infante granted the motion to produce the transcript and signed a standard CJA Form 21 voucher. On February 21, however, Judge Thompson issued a memorandum denying defense counsel's request for the transcript, citing the failure to demonstrate any "particularized need" for it. Judge Corcoran, to whom the case was assigned for trial, refused to overrule Judge Thompson on the transcript question.

Rosales-Lopez asserts that the allegedly irregular method of reviewing the magistrate's ruling requires reversal, and raises both constitutional and statutory issues on the denial of the transcript. Because we find that the denial of the transcript was harmless beyond a reasonable doubt, we find it unnecessary to address the procedural question raised by Rosales-Lopez.

While we are convinced that Rosales-Lopez was not prejudiced by the government's failure to provide him with a transcript, we feel some comments on the issue of providing trial aids to indigents are in order. The duty of the government to provide an indigent criminal defendant with the essential tools of trial defense is of both a constitutional and statutory dimension. *See generally Britt v. North Carolina*, 404 U.S. 226, 92 S.Ct. 431, 30 L.Ed.2d 400 (1971); 18 U.S.C. § 3006A. Under certain circumstances, a transcript of a prior proceeding related to a criminal prosecution may be an item which the government is required to furnish to the indigent. *See Britt v. North Carolina, supra; Roberts v. LaVallee*, 389 U.S. 40, 88 S.Ct. 194, 19 L.Ed.2d 41 (1967). Where a mistrial has occurred, courts have generally regarded a transcript of the prior trial as a tool "reasonably necessary" to an effective defense and have deemed it error to refuse to provide

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"Mr. Cleary: Could I ask that rather than dismissing my motions that my motions be transferred to the magistrate?

"The Court: No. It's improperly brought in this court according to local rules, so it would be dismissed without prejudice, which means you can bring it again." R.T. 92-93.

the defendant with such a transcript, provided that a timely request is made for its production. *See, e.g., United States v. Johnson*, 584 F.2d 148 (6th Cir. 1978), *cert. denied sub nom., Monger v. United States*, 440 U.S. 918, 99 S.Ct. 1239, 59 L.Ed.2d 469 (1979); *United States v. Jonas*, 540 F.2d 566 (7th Cir. 1976); *United States v. Baker*, 523 F.2d 741 (5th Cir. 1975); *United States v. Acosta*, 495 F.2d 60 (10th Cir. 1974); *United States v. Young*, 472 F.2d 628 (6th Cir. 1972); *United States ex rel. Wilson v. McMann*, 408 F.2d 896 (2d Cir. 1969); *Peterson v. United States*, 351 F.2d 606 (9th Cir. 1965); *But see United States v. Brown*, 443 F.2d 659, 143 U.S.App.D.C. 244 (D.C.Cir. 1970); *Forsberg v. United States*, 351 F.2d 242 (9th Cir. 1965).

Where, however, the indigent defendant requests a transcript of a preliminary proceeding, courts have been less willing to find error in the failure to so provide. In *Roberts v. LaVallee, supra*, the Supreme Court struck down per curiam on equal protection grounds a New York statute which required all criminal defendants to pay five cents for every hundred words of requested transcripts of preliminary proceedings. The Court, however, did not address the limits of the indigent's right to a free transcript in such cases. Circuit courts considering the issue have generally shown a greater inclination to examine the actual prejudice to the defendant resulting from the denial of a transcript of a preliminary hearing than has been shown in cases involving the denial of a trial transcript. In *United States ex rel. Moore v. People of the State of Illinois*, 577 F.2d 411 (7th Cir. 1978), *cert. denied*, 440 U.S. 919, 99 S.Ct. 1242, 59 L.Ed.2d 471 (1979), the court found error in the failure to provide a transcript of a preliminary hearing at which an allegedly suggestive confrontation took place between the defendant and a rape victim, but held the error to be harmless beyond a reasonable doubt. In *United States ex rel. Cadogan v. La Vallee*, 428 F.2d 165 (2d Cir. 1970), *cert. denied*, 401 U.S. 914, 91 S.Ct. 887, 27 L.Ed.2d 813 (1971), failure to provide a transcript of a suppression hearing was held to be not prejudicial

where alleged discrepancies between testimony given at the hearing and at trial were "trival."

While the standard of reasonable nececessity in the area of free transcripts remains imprecise, the court below applied a standard which we find to be incorrect. The Supreme Court in *Britt v. North Carolina*, *supra*, ruled out "particularized need" as the applicable test for necessity. *See* 404 U.S. at 228, 92 S.Ct. at 434. We find, however, that the application of an erroneous legal standard in this case was harmless beyond a reasonable doubt. Rosales-Lopez claims prejudice in that two Immigration Service agents gave testimony at the suppression hearing which would have been useful in impeaching their testimony at trial. The defense, however, can point to only two minor inconsistencies between the testimony at the suppression hearing and the testimony given at trial.[4] Given the overall strong consistency between the lengthy testimony given by the witness at the hearing and the trial, we find beyond a reasonable doubt that the lack of a copy of the suppression hearing transcript did not prejudice the ability of the defense to cross-examine effectively and thereby present an adequate defense at trial.

V. *SENTENCING PROCEDURE*

Rosales-Lopez claims that he was improperly sentenced by Judge Thompson, who had not presided at trial. Judge Corcoran, a visiting judge who sat in the district by desig-

[4] At the suppression hearing, Investigator Sanders testified that after the Oldsmobile arrived at the Los Angeles address, he made the following observation: ". . . I saw three people get out of the trunk of the Oldsmobile and go up the stairs to the second story apartment, with Humberto Rosales and the unknown Latin behind him." (R.T. 42) At trial, Investigator Sanders testified that Rosales-Lopez and the unknown male "hurried" the aliens up the stairs." (R.T. 196).

A second alleged inconsistency arose where, at the suppression hearing, Investigator Sanders described the driver of the Oldsmobile as ". . . a male Latin, with short, black hair. I believe he was wearing sunglasses, probably about 25 to 30 years old, maybe." (R.T. 73) At trial, Sanders described the driver as having "some kind of glasses," and described his age as "around 30." (R.T. 212).

nation, had presided at the trial but had returned to his home district prior to sentencing.

Fed.R.Crim.Proc. 25(b) allows for a district judge who did not preside at trial to pass sentence where the presiding judge is unable to do so by reason of "absence, death, sickness or other disability." The procedure under Rule 25(b) is proper where the sentencing judge is familiar with the case, and uses informed discretion in passing sentence. *United States v. Ortiz*, 603 F.2d 76, 81 (9th Cir. 1979), *cert. denied*, ___ U.S. ___, 100 S.Ct. 678, 62 L.Ed.2d 652 (1980). In this case, Judge Thompson had presided over certain pre-trial matters, and had studied the presentencing report. The sentence itself reflects an informed discretion since the consecutive sentences on six of the counts were suspended. The passing of sentence by Judge Thompson was not error.

VI. *PROSECUTORIAL VINDICTIVENESS*

Rosales-Lopez moved for dismissal below on the ground of vindictive prosecution, and for an evidentiary hearing relating to the dismissal motion. The court denied both motions.

The basis of the dismissal motion was that other members of the alien smuggling ring were allowed to plead to lesser misdemeanor counts and placed on probation. Rosales-Lopez maintains that his prosecution on felony counts was in response to his insistence on a jury trial, and that he was thereby "penalized" for exercising a constitutional right.

A defendant's right to due process of law is violated where the prosecution increases the severity of alleged charges in response to the exercise of a constitutional or statutory right. *See generally Blackledge v. Perry*, 417 U.S. 21, 94 S.Ct. 2098, 40 L.Ed.2d 628 (1974); *North Carolina v. Pearce*, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969); *United States v. Ruesga-Martinez*, 534 F.2d 1367 (9th Cir. 1976). Vindictiveness is normally found where the government has occasion to re-indict or re-try a defendant following the exercise of a procedural

right. *See United States v. Ruesga-Martinez, supra,* at 1369. Our circuit has refused to find the action of the prosecutor in reindicting a defendant vindictive where the charges contained in the second indictment expose the defendant to no greater risk of punishment than did those contained in the first indictment. *See United States v. Snell,* 592 F.2d 1083 (9th Cir.), *cert. denied,* 442 U.S.___, 99 S.Ct. 2889, 61 L.Ed.2d 315 (1979).

In the present case, Rosales-Lopez has not faced any increased risk of punishment in response to the exercise of his rights. If anything, his risk of punishment was lessened by the superseding indictment, which dropped a number of the original counts. The court below did not err in refusing to dismiss on the basis of Vindictive prosecution.

VII. *INSTRUCTION ON LESSER INCLUDED OFFENSE*

Rosales-Lopez requested, but did not receive, an instruction on the lesser-included offense of aiding and abetting the illegal entry of an alien under 8 U.S.C. § 1325 and 18 U.S.C. § 2. He argues that 8 U.S.C. § 1324(a)(1) contains an element of knowledge that the alien entered the United States within the past three years, which is in addition to the elements of aiding and abetting entry under § 1325.

We cannot agree that § 1325 is properly chargeable as a lesser included offense. An element of the charge of aiding and abetting any offense under 18 U.S.C. § 2 is guilty knowledge. In this regard, we cannot find that § 1324 imposes an additional element in the government's burden of proof. *Cf. United States v. Wishart,* 582 F.2d 236 (2d Cir.), *cert. denied,* 439 U.S. 987, 99 S.Ct. 582, 58 L.Ed.2d 660 (1978); *United States v. Madden,* 525 F.2d 972 (5th Cir. 1976).

VIII. *CONSECUTIVE SENTENCES*

Rosales-Lopez contends that the imposition of consecutive sentences for conviction on counts of conspiracy, aid-

ing and abetting the illegal transportation of aliens, and concealing, harboring and shielding illegal aliens constitutes an unreasonably pyramiding of punishment in contravention of the intent of Congress in enacting the statutory scheme dealing with illegal aliens.

The imposition of consecutive sentences on separate counts is improper where the separate offenses encompass successive steps or grades which normally flow into the same criminal act. *United States v. Hernandez-Miranda*, 601 F.2d 1104, 1109 (9th Cir. 1979). An example of an instance where separate offenses flow into the same criminal act is an indictment for illegal entry by alien, 8 U.S.C. § 1325, and illegal re-entry of a deported alien, 8 U.S.C. § 1326, where the alien is charged with violating both statutes by a single act of entry. *United States v. Ortiz-Martinez*, 557 F.2d 214 (9th Cir. 1977).

The offenses with which Rosales-Lopez was charged do not constitute a single criminal act. The evidence adduced at trial revealed that Rosales-Lopez had engaged in some advance planning with other members of the smuggling ring, had sheltered the aliens at the Bowling residence, and had been clearly involved in the transportation of the aliens from Imperail Beach to Los Angeles. While it may not be unusual for these acts to occur in close relation to each other, each constitutes a separate danger to the public interest in preventing the entry of illegal aliens, and it is reasonable to find that Congress intended for each to be punished separately. No error was committed in the imposition of consecutive sentences.

IX. *EQUAL PROTECTION*

8 U.S.C. § 1324 contains a specific exemption proclaiming that employment of aliens shall not constitute "harboring." Rosales-Lopez claims that this exemption violates equal protection, and that his prosecution under the section was, therefore, illegal. Contrary to the assertion of defense counsel, we adequately disposed of this argument in *United States v. Acosta de Evans*, 531 F.2d 428 (9th Cir.), *cert. denied*, 429 U.S. 836, 97 S.Ct. 103, 50 L.Ed.2d

101 (1976). That decision is controlling. Rosales-Lopez was not denied equal protection of the laws.

X. *CONCLUSION*

The judgment of the court below, and the imposition of sentences are

AFFIRMED.

Supreme Court of the United States

No. 79-6624

HUMBERTO ROSALES-LOPEZ, PETITIONER,

v.

UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI TO THE United States Court of Appeals for the Ninth Circuit.

ON CONSIDERATION of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted, limited to Question 1 presented by the petition.

October 6, 1980

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

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HUMBERTO ROSALES-LOPEZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. McCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

JOHN F. DePUE
Attorney
Department of Justice
Washington, D.C. 20530
(202) 633-2217

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

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v.

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ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

QUESTIONS PRESENTED

1. Whether the trial judge erred in refusing to question the jurors concerning possible bias against persons of Mexican descent.

2. Whether it was proper for a substitute judge, who did not preside at the trial, to impose sentence upon petitioner.

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 617 F.2d 1349.

JURISDICTION

The judgment of the court of appeals was entered on March 20, 1980. A petition for rehearing was denied on May 12, 1980 (Pet. App. B), and the petition for a writ of certiorari was filed on May 20, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of California, petitioner was convicted on one count of conspiracy to conceal, harbor, shield, and illegally transport aliens, in violation of 18 U.S.C. 371 (Count 1); three counts of transporting illegal aliens, in violation of 8 U.S.C. 1324(a)(2) (Counts 2-4); and three counts of concealing, harboring, and shielding aliens, in violation of 8 U.S.C. 1324(a)(3) (Counts 5-7). He was sentenced to consecutive terms of eighteen months' imprisonment on the conspiracy count and five years' imprisonment on each of the substantive counts; however, the sentences on the substantive counts (Counts 2-7) were suspended in favor of a term of five years' probation to commence following petitioner's release from custody. The court of appeals affirmed (Pet. App. A).

As summarized by the court below (Pet. App. A, 2397-2398), the evidence showed that, during the night of December 10-11, 1978, three aliens, led by an unidentified guide, left Tijuana, Mexico, on foot and unlawfully crossed the international border into the United States. Following the crossing, the guide transported the aliens by automobile to the Imperial Beach residence of co-defendant Virginia Bowling, where petitioner admitted them into the garage.

Thereafter, petitioner concealed the aliens and their guide in the trunk of an automobile. Bowling then drove the vehicle containing the illegal aliens north on Interstate Five through the San Clemente checkpoint while petitioner followed in another vehicle. Once beyond the checkpoint, Bowling and petitioner exchanged automobiles, and the guide drove the vehicle containing the concealed aliens to Los Angeles. Upon arriving in Los Angeles, the aliens were released from the trunk, and petitioner instructed them to enter an apartment where they were met by co-defendants Falcon-Zavala and Flores. At approximately noon on December 11, Flores departed in an automobile with two of the aliens, and petitioner, Falcon-Zavala, and the third alien left the apartment in another automobile. Shortly thereafter, agents of the Immigration and Naturalization Service, who had followed petitioner from the Bowling residence to Los Angeles and had maintained surveillance of the apartment, stopped the two automobiles and arrested petitioner and his cohorts.

ARGUMENT

1. Petitioner is a resident alien of Mexican descent. Relying on Ristaino v. Ross, 424 U.S. 589 (1976) and Aldridge v. United States, 283 U.S. 308 (1931), he contends (Pet. 3-5) that the trial court committed reversible error when it refused to ask prospective jurors whether they would "consider the race or Mexican descent of [petitioner] in [their] evaluation of this case" (R. Doc. 11 at 2; Tr. 157; Pet. App. 2399, n.1). This claim is unfounded.

In Ristaino, a black defendant was convicted in state court of assaulting a white security guard. Although this Court ruled that the state trial judge was not constitutionally required to conduct voir dire questioning specifically directed to uncovering racial prejudice, the Court stated that, in the exercise of its supervisory power, it would have required a federal court under the same

circumstances to inquire into racial prejudice at the request of the defense (424 U.S. at 597 n.9). In Aldridge v. United States, supra, the Court exercised its supervisory power in reversing the conviction of a black defendant sentenced to death for the murder of a white police officer where the federal trial court had refused the defendant's request that the jurors be questioned about racial prejudice. See Ristaino v. Ross, supra, 424 U.S. at 598 n.10.

Neither Ristaino nor Aldridge requires reversal here. As the court of appeals properly concluded (Pet. App. A, 2400), "the facts of Ristaino presented a greater likelihood of prejudice than do the facts of the present case," and petitioner's Mexican heritage therefore "did not, in and of itself, require the court below to pose a question on racial prejudice to the venire." Ristaino and Aldridge involved interracial crimes of violence against a security guard and a police officer. The instant case, on the other hand, involved a victimless crime, and there is no evidence that the trial was charged with any racial or ethnic overtones. See United States v. Polk, 550 F.2d 1265, 1267 (10th Cir.), cert. denied, 434 U.S. 838 (1977); United States v. Perez-Martinez, 525 F.2d 365, 367 (9th Cir. 1975).

The greatest potential for prejudice at petitioner's trial resulted from the allegation that petitioner harbored and transported illegal aliens in a locality where such activities are a particularly sensitive issue. However, the trial judge not only inquired generally whether the members of the venire knew of any reason why they could not sit as fair and impartial jurors (Tr. 151), but specifically asked whether their attitudes toward illegal aliens would affect their impartiality (Tr. 146-147), and two jurors were excused on that basis. Thus, petitioner was adequately protected against any juror bias arising from the nature of the charges against him.

Nor does the decision below conflict with those decisions which require inquiry into possible racial prejudice whenever the accused is a member of a racial minority. See, e.g., United States v. Williams, 612 F.2d 735, 736-737 (3d Cir. 1979), cert. denied No. 79-6109 (Mar. 17, 1980); United States v. Bowles, 574 F.2d 970, 972-973 (8th Cir. 1978); see also United States v. Bell, 573 F.2d 1040, 1042-1043 (8th Cir. 1978). 1/ Each of these cases involved an ascertainable racial minority, such as blacks. This, however, is not such a case; petitioner's proffered bias inquiry was not based upon the fact that he was a member of a minority race but upon his Mexican ancestry. As the court noted in United States v. Perez-Martinez, supra, 525 F.2d at 368 & n.4, national origin is fundamentally different from race, and there is no reason to treat these two concepts alike for purposes of reviewing a trial court's conduct of the jury voir dire. Thus, while a number of courts have held that a defendant is entitled to an inquiry concerning prejudice against members of his race without demonstration of special circumstances, these decisions do not necessarily mandate queries concerning biases on account of a defendant's ethnic background or national origin, and they are not inconsistent with the decision of the court below.

The purpose of the voir dire examination is to preserve the right to trial by a competent and impartial jury. The scope of examination necessary to achieve this purpose rests in the broad discretion of the trial judge, as this Court has repeatedly held. See Ristaino v. Ross, supra, 424 U.S. at 594-598; Aldridge v. United States, supra, 283 U.S. at 310; see also Ham v. South Carolina, 409 U.S. 524, 527-528 (1973); Fed. R. Crim. P. 24(a). Petitioner has

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1/ Compare United States v. Polk, supra; United States v. Perez-Martinez, supra; United States v. Walker, 491 F.2d 236, 239 (9th Cir.), cert. denied, 416 U.S. 990 (1974).

failed to demonstrate an abuse of the trial court's discretion in the circumstances presented here.

2. Petitioner was tried before Judge Howard F. Corcoran, a visiting judge from the United States District Court for the District of Columbia. After the guilty verdict was returned, Judge Corcoran refused to impose sentence upon petitioner until a presentence report was completed (Tr. 594-598). Judge Corcoran's temporary assignment ended before the completion of the presentence report, and petitioner was sentenced by Judge Gordon Thompson, of the Southern District of California. This procedure was wholly proper, petitioner's contrary contention (Pet. 5-8) notwithstanding.

On its face, Rule 25(b), Fed. R. Crim. P., unambiguously provides that "[i]f by reason of absence, death, sickness or other disability the judge before whom the defendant has been tried is unable to perform the duties to be performed by the court after a verdict or finding of guilt, any other judge regularly sitting in or assigned to the court may perform those duties * * *." 2/ This rule authorizes a district judge who did not preside at trial to impose sentence when the presiding judge is unable to perform that duty due to absence. See, e.g., United States v. Ortiz, 603 F.2d 76, 81 (9th Cir. 1979), cert. denied, No. 79-5513 (Jan. 7, 1980); United States v. McCallie, 554 F.2d 770, 773-774 (6th Cir. 1977) (collecting cases). As the court below observed (Pet. App. A, 2403), Judge Thompson was familiar with this case because he had read the presentence report and had presided over certain pretrial matters; accordingly, Judge Thompson was fully

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2/ Nothing in the language of Rule 25(b) supports petitioner's suggestion (Pet. 8) that it is impermissible for a judge, other than the judge who presided over the trial, to impose sentence when the defendant objects to such a substitution.

qualified to impose sentence upon petitioner. Moreover, the sentence itself can hardly be viewed as an abuse of discretion, since petitioner was sentenced to 18 months' imprisonment on the conspiracy count, the sentences on the six substantive counts having been suspended in favor of five years' probation (Sent. Tr. G-I). 3/

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. McCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

JOHN F. DePUE
Attorney

JULY 1980

3/ Petitioner mistakenly contends (Pet. 7) that the decision of the court below conflicts with United States v. Bowser, 497 F.2d 1017 (4th Cir.) cert. denied, 423 U.S. 997 (1974). In Bowser, the court acknowledged that a judge other than the judge who presided over the trial is empowered to impose sentence. However, it remanded the case for resentencing by the judge who initially imposed sentence because of his unexplained imposition of the maximum sentence despite the absence of any aggravating factors. In those circumstances, the court of appeals concluded that the sentencing judge may have failed to exercise any discretion. Id. at 1019-1020. Here, by contrast, the sentencing judge, who was familiar with the case, suspended all except 18 months of the sentence of imprisonment, even though petitioner could have received consecutive sentences on all seven counts aggregating 35 years' imprisonment.

Finally, there is no merit to petitioner's contention (Pet. 6) that the sentence he received was impermissibly disproportionate to the sentences imposed upon his co-defendants. While it is true that co-defendants Falcon-Zavala and Bowling received more lenient sentences than petitioner, they each pleaded guilty to one count and cooperated by testifying for the government at petitioner's trial. In contrast, petitioner was convicted on all seven counts of the indictment. Moreover, petitioner's attempt to minimize his role in the alien smuggling ring is misleading. Co-defendant Bowling testified that pursuant to an arrangement she had with petitioner, she and petitioner would split the money equally after petitioner had paid the guide (Tr. 369). Co-defendant Falcon-Zavala testified that while he was merely a driver receiving $7 per person for transporting illegal aliens (Tr. 423, 446), petitioner sometimes acted as a guide, and collected payments from the families of the illegal aliens (Tr. 434, 451-452).

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

No. 79-6624

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HUMBERTO ROSALES-LOPEZ,

PETITIONER,

v.

UNITED STATES OF AMERICA,

RESPONDENT.

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REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOHN J. CLEARY
Federal Defenders of San Diego, Inc.
225 Broadway, Suite 855
San Diego, California 92101
Telephone: 714-234-8467
FTS 895-5240

Attorneys for Petitioner

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

No. 79-6624

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PETITIONER,

v.

UNITED STATES OF AMERICA,

RESPONDENT.

REPLY

Because of statements raised for the first time in the brief for the United States in opposition to the petition for writ of certiorari, this reply is filed.

REASONS FOR GRANTING THE WRIT

I. The inadequate voir dire by the trial court refusing to ask a question concerning race when a Mexican was charged with an immigration offense is a clear break with established precedent for the federal courts.

The Petitioner, a Mexican,[1/] was on trial for

1/ Although the Brief in Opposition (p. 3) freely refers to the Petitioner as a "resident alien of Mexican descent," he has since been deported to Mexico after being paroled. The Petitioner still faces the suspended 30-year sentence which gives this Court continuing jurisdiction. United States v. Campos-Serrano, 404 U.S. 293 (1971).

smuggling aliens from Mexico. The Government characterized the trial without racial or ethnic overtones:

> The instant case, on the other hand, involved a victimless crime, and there is no evidence that the trial was charged with any racial or ethnic overtones.

[Brief in Opposition 4]

During voir dire examination on the question of whether the jurors "had any feelings about the alien problem," two jurors expressed reservations and were summarily excused [R.T. 146-147]. That feeling may have been generated towards the persons transported rather than the Petitioner (the alleged smuggler) and may have been connected with racial or ethnic considerations. The extremely truncated voir dire produced an explosive response on this touchy issue which should have triggered the court's inquiry as to this important question stressed in the original written voir dire questions and again specifically asked for by trial defense counsel.[2/]

Although the Petitioner would contend that the nature of the case itself triggers an inquiry into racial, ethnic, or other discriminatory attitude towards a person of Mexican descent, other circumstances of the case also required this inquiry. The chief prosecution witness, a co-defendant, Virginia Bowling, was white Anglo. Her daughter was in love with the Petitioner and as a result the Petitioner started living in Virginia Bowling's home approximately six months before the alien smuggling incident. [R.T. 360] That relationship could have aggravated any latent racial antagonism of a juror

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2/ The denial of personal voir dire and the hurried, brief voir dire conducted solely by the judge is the type of voir dire that should be critically evaluated by this Court as a fair implementation of the original intent and purpose of Rule 24(a), Federal Rules of Criminal Procedure. Not only is there an abuse of Rule 24(a) that should be addressed by this Court, but in the context of a denial of an explicit demand for an inquiry concerning race or color deserves consideration by this Court.

against the Petitioner.[3]

The Government's contention that Mexican ancestry is distinguishable from being a member of a minority race [Brief in Opposition 5] is not a distinction recognized by this Court. In Hernandez v. Texas, 347 U.S. 475 (1954), Texas had attempted to state there were two racial classes--white and Negro--within the contemplation of the Fourteenth Amendment. This Court made it clear that discrimination on the basis of race or color, including delineation as to Mexican descent, was protected under federal law. See also Castaneda v. Partida, 430 U.S. 482 (1977). It is too late to say this Court would permit discrimination on the basis of Mexican descent but not on the basis of race. The thrust of the opinion in Ristaino v. Ross, 424 U.S. 589 (1976), in the context of federal courts indicated that voir dire questioning should be able to probe for this fundamental prejudice.

To deny review in this case is to manifest that there are no minimum standards or requirements for voir dire questioning in a federal criminal case.[4]

---

[3] Petitioner was living with Bowling's 19-and-one-half-year-old daughter in Bowling's house with food and other subsistence provided by Bowling [R.T. 408]. Bowling referred to her daughter as a "junkie" (heroin user). When Virginia Bowling was asked if her daughter had run any illegal aliens, she answered, "You will have to ask her about that." [R.T. 410]

[4] Rhetorical inquiry in this case was no voir dire at all. In the "Chicago Seven Conspiracy Trial," United States v. Dellinger, 472 F.2d 340 (7th Cir. 1972), the court stated:

> The government's position must rest upon an assumption that a general question to the group whether there is any reason they could not be fair and impartial can be relied on to produce a disclosure of any disqualifying state of mind. We do not believe that a prospective juror is so alert to his own prejudices. Thus it is essential to explore the backgrounds and attitudes of the jurors to some extent in order to discover actual bias, or cause. 472 F.2d at 367.

II. The judge who presided at a complex alien smuggling jury trial and sentenced a co-defendant declined to sentence the defendant as requested for the convenience of the probation office, and over objection the substitution of a different judge who had not read the trial transcript for sentencing was serious error.

The Government contends that the sentencing judge, who did not hear the evidence at the jury trial in which two co-defendants testified, one of whom was later sentenced by the trial judge, was familiar with the case even though, unlike the court of appeals, he did not review the transcript of the trial [Brief in Opposition 7 n.3]. That claim is buttressed by the fact that the judge suspended all except 18 months of the sentence of imprisonment even though a sentence of 35 years imprisonment may have been imposed. The federal prosecutor recommended 18 months (confinement) as an adult [Sentencing Transcript F-G].[5/] The sentencing judge then added the suspended term of 30 years in addition to the 18 months recommended by the prosecution [Sentencing Transcript G]. The fashioning of a sentence that conforms to the one recommended by the prosecution does not manifest of itself familiarity with the case but rather reliance upon a prosecutorial formulation of the worth of the case or the appropriate sanction. If anything, it indicates an abdication of judicial discretion. This sentencing was not a careful evaluation of the roles of the other defendants, but much like the decision in United States v. Bowser, 497 F.2d 1017 (4th Cir. 1974), required resentencing because the judge was not familiar with the facts and circumstances of the case.

Appellate courts give sometimes undue deference to the decisions of juries because they have evaluated the

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5/ The probation department had recommended two years.

demeanor of witnesses. At this critical stage of sentencing a second judge who has not observed the demeanor of witnesses and two co-defendants and has not reviewed the cold transcript of their testimony, is unable to substitute for the trial judge by sole reliance on a short pretrial motion hearing and a limited presentence report.

In this case it was possible for the trial judge to have sentenced Petitioner by simply requesting an expedited presentence report as requested by the defense. Although there would be some inconvenience to the federal judicial system to achieve the sentencing by the trial judge, failure to do so because of the inconvenience demonstrated by this record, deserves the review of this Court so as to provide some standards for substitution of different judges at sentencing.

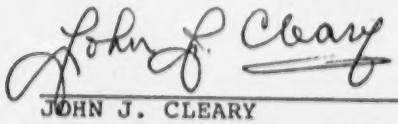
The federal judiciary has two separate policies for the use of visiting judges. One, for such transfers intra-circuit and another for inter-circuit. This case questions those policies which should be reviewed by this Court. A policy which favored intra-circuit transfers of judges might have alleviated the problem created in this case.

CONCLUSION

If the Petitioner had been convicted in a state court, the request for relief from this Court may not be warranted. However, the issues framed in the context of a federal criminal case of both a constitutional and supervisory responsibility merit review and consideration by this Court. For the reasons set forth in the original petition for writ of certiorari as well as those set forth in this reply, it is urged that a writ of certiorari issue to review the judgment of the U.S. Court of Appeals for the Ninth Circuit and that this Court either summarily reverse or set the case down for oral argument and further consideration.

Respectfully submitted,

DATED: 31 July 1980



JOHN J. CLEARY
Federal Defenders of San Diego, Inc.
225 Broadway, Suite 855
San Diego, California 92101
Telephone: 714-234-8467
FTS 895-5240

Attorneys for Petitioner

Supreme Court, U. S.
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BRIEF OF THE PETITIONER

JOHN J. CLEARY
Federal Defenders of
San Diego, Inc.
225 Broadway, Suite 855
San Diego, California 92101
(714) 234-8467
FTS 895-5240

Court-appointed Counsel for Petitioner

Washington, D.C. • CLB PUBLISHERS' • LAW PRINTING CO. • (202) 393-0625

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Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF THE PETITIONER

QUESTION PRESENTED FOR REVIEW[2]

Whether the district court's refusal to ask the defense-requested *voir dire* question on possible racial prejudice against a Mexican defendant charged with an immigration offense was a denial of constitutional due process and reversible error for a federal trial court?

---

[1]The Petitioner was the only one of the five defendants originally indicted to appeal to the Ninth Circuit and seek review in this Court. Joe Manuel Flores is a fugitive and Jose Humberto Zavala ("the heaviest out of them" [R.T. 220]) pled to a misdemeanor. David Falcon-Zavala and Virginia Hendricks Bowling testified for the Government and received probationary sentences.

[2]Although two questions were presented in the petition for writ of certiorari, this Court granted review only as to the first question.

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OPINIONS AND JUDGMENTS

On 2 April 1979 the Petitioner was sentenced to a term of imprisonment for 18 months (conspiracy), and on the remaining six counts (illegal alien transportation and concealment) was given a consecutive 30-year sentence (six consecutive terms of five years each) suspended and the Petitioner placed on probation for a period of five years [C.R. 16; App. 35-36].[3] The opinion of the U.S. Court of Appeals is now officially reported as *United States v. Rosales-Lopez,* 617 F.2d 1349 (9th Cir. 1980).

JURISDICTION

Jurisdiction of this Court to review by petition for writ of certiorari the judgment of the court of appeals affirming the conviction of the Petitioner for conspiracy and illegal transportation of aliens (18 U.S.C. §371 and 8 U.S.C. §1324) is conferred by 18 U.S.C. §1254(1).[4] On 20 March 1980 the court of appeals entered judgment affirming the conviction of Petitioner, and on 12 May 1980 denied his petition for rehearing. On 20 May 1980 (within the then existing 30-day time limitation pursuant to old Rule 22) the petition for writ of certiorari was filed in this Court.

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[3] "C.R." refers to the document in the Clerk's Record (official papers), and "R.T." refers to the page in the Reporter's Transcript. "App." refers to the joint appendix in this Court.

[4] The Petitioner has been paroled on the 18-month sentence and deported to Mexico (10 October 1979), but the 30-year suspended sentence gives this Court continuing jurisdiction. *United States v. Campos-Serrano,* 404 U.S. 293, 294-95 (1971).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution:

Article III, Section 2, Paragraph 3: The trial of all Crimes, except in Cases of Impeachment, shall be by jury . . . .

Amendment V: No person shall be . . . deprived of life, liberty, or property without due process of law . . . .

Amendment VI: In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . .

STATEMENT OF THE CASE

The Nature of the Case

The Petitioner Humberto Rosales-Lopez[5] was charged and convicted of conspiracy to harbor and transport illegal aliens (18 U.S.C. §371), aiding and abetting Virginia Hendricks Bowling (hereafter referred to as Bowling) in the transportation of three illegal aliens [8 U.S.C. §1324(a)(2) and 18 U.S.C. §2], and with Bowling, as an uncharged co-defendant, of concealing and harboring the same three illegal aliens [8 U.S.C. §1324(a)(3)][6] [C.R. 6].

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[5]The Petitioner was deported under the name of Martin Gomez-Gonzales according to information provided by the Immigration and Naturalization Service.

[6]For each violation with respect to each alien, 8 U.S.C. §1324(a) (§274 of the Immigration and Nationality Act of 1952) provides a penalty of five years, or a $2,000 fine, or both.

Voir Dire Proceedings

The day before trial, defense counsel filed a Requested *Voir Dire* [Docket Entries 26 February 1979; C.R. 11; App. 9-12]. In this formal request the defense expressly sought personal *voir dire* to probe for bias and to acquire a factual basis for the exercise of challenges:

> Pursuant to Rule 24(a), Federal Rules of Criminal Procedure, to provide effective assistance of counsel and to exercise the defendant's right to a trial by an impartial jury, defense counsel expressly requests the opportunity to personally *voir dire* the prospective members of the jury. Defense counsel expressly agrees to limit his questioning to no more than 30 minutes to make a reasonable inquiry of the background of the prospective members of the jury in order to intelligently exercise his challenges for cause and peremptory challenges. The judge can never adequately probe from the perspective of the defendant. The defense does not object to the Court's general inquiry, but does ask for this opportunity to determine if the jurors are truly sensitive yet unbiased to the issues and persons in this case.

[C.R. 11-1; App. 9]

If the opportunity for counsel to personally *voir dire* the jurors were denied, defense counsel requested the court to ask the prospective members of the jury 26 questions. One of them was a question framed with reference to possible racial prejudice towards the Petitioner:

> 7. Would you consider the race or Mexican descent of Humberto Rosales-Lopez in your evaluation of this case? How would it affect you?

[C.R. 11-2; App. 10]

On the morning of the first day of trial, the court indicated

that it would *voir dire* the jury and implicitly denied counsel's request for personal *voir dire* [R.T. 140; App. 13-14]. Defense counsel asked the district judge to give a preliminary instruction to discuss with the prospective jurors their attitude, their understanding of the law, or anything of that nature. This request was made because defense counsel was foreclosed from *voir dire* [R.T. 140; App. 13-14]. The court denied the request for preliminary instructions and indicated that counsel could have a side bar after *voir dire* by the court to ask further questions [R.T. 141; App. 14]. The court advised the jurors that in order for the Petitioner to have a fair and impartial jury trial certain questions would be addressed to the panel and advised that the case involved conspiracy and the substantive offenses to harbor and transport aliens illegally in the United States [R.T. 142; App. 14-15].

The court introduced the Petitioner, counsel, and named prospective witnesses [R.T. 142-43; App. 15-16]. The jurors indicated that they had no prior knowledge of the case from the media and also were unaware of any of the co-defendants [R.T. 143-44; App. 15-16]. After asking the jurors whether they had close friends or relatives employed by law enforcement, the court inquired of those who indicated such contacts whether their judgment would be affected [R.T. 144-45; App. 16-17]. The court then had an exchange with the jurors concerning the fact that this case involved aliens:

> THE COURT: Now, this case, as I have already announced, involves aliens alleged to be illegally in the United States. Do any of you have any feelings about the alien problem at all? Is there anything about it that would cause you to—yes ma'am?
>
> JUROR ROSA: My name is Palos De La Rosa. It is

just a name that they use for the people to transport illegal aliens and to place them intentionally—

THE COURT: Very well. You may be excused. Would you return to the jury lounge, please.

* * *

THE COURT: It might be.

Let me ask the general question: Do any of you have any particular feelings one way or the other about aliens or could you sit as a fair and impartial juror if you are called upon to do so?

In the back row?

JUROR SKELLY: Kristine Skelly, and I have mixed feelings about it. I don't think I could be impartial. I have a tendency to feel—my own feelings, I don't think I could be a fair juror.

THE COURT: Very well, you will be excused. Would you return to the jury lounge, please?

[R.T. 146-47; App. 17-18]

One juror thought the Petitioner looked familiar [R.T. 146; App. 17-18]. The court then inquired as to visual and hearing acuity of the jurors [R.T. 147; App. 18]. In response to a question about legal education, one juror indicated that he was a corporate attorney and the other had been a court liaison with the military [R.T. 147-48; App. 18-19]. The court then asked if any of the jurors had any quarrel with the defendant's presumption of innocence, and after receiving a negative response terminated the general questioning [R.T. 149; App. 19]. The total *voir dire* questioning lasted approximately six minutes[7] [R.T. 141-49; App. 14-24; 26-28].

The clerk then called 31 prospective jurors [R.T. 149-50;

[7]This estimate is based on oral timed readings of the transcript.

App. 20]. When the judge announced that the trial might take two or three days, a juror with a business trip was excused [R.T. 151; App. 21]. The court then put one additional general question to the whole *venire*:

> Does any reason occur to anyone of you why you could not sit in this case as a fair and impartial juror, any reason whatsoever? I assume that the answer is no.

[R.T. 151] The judge then asked each juror to stand up, give his or her name, address, occupation, spouse's occupation, if retired previous occupation, and length of residence in San Diego, and the 31 prospective jurors responded [R.T. 151-56; App. 21-24]. The court then asked counsel to approach the bench. Defense counsel, "to at least preserve [the] concept of the impartial jury and explore the background of challenges and peremptory challenges", asked that the proposed written *voir dire* questions on possible racial prejudice toward the Petitioner be asked:

> The next question as to Mexican descent or race of my client, I think it is Aldredge, 1898, [sic] and notwithstanding the Supreme Court decision as to state cases,[8] clearly in a federal case, the Court must explore all racial antagonism against my client because he happens to be of Mexican descent.

[R.T. 157; App. 25]

Defense counsel also expressly asked that five other previously requested questions be put to the *venire,*[9] [R.T. 158; App. 25-26], but the court refused to use any of these

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[8]Referring to *Ristaino v. Ross,* 424 U.S. 589 (1976).

[9]These questions sought whether the jurors hired illegal aliens (No. 6), worked for the federal government (No. 13), had been a victim of a crime (No. 16), had sat previously as a juror (No. 18), and were able to speak Spanish (No. 23) [C.R. 11-2,3; App. 10-11].

supplemental questions [R.T. 159; App. 25-26].

The court sat three alternates who gave their occupation and residence [R.T. 159-60; App. 26-27]. Using the "struck method" defense and Government counsel exercised all their peremptory challenges on the primary panel.[10] None of the 12 jurors selected had a Hispanic surname[11] [R.T. 160-61; App. 27].

Evidence at Trial[12]

Bowling, an American (Anglo) born in the United States [R.T. 368, 383; App. 31], was originally charged as a felony defendant [C.R. 1]. After pleading guilty to a misdemeanor, the Government had no opposition to the transfer of her case from a district judge to a magistrate and probation. Bowling then testified for the Government [R.T. 414-15]. She had been in the illegal alien smuggling business since December 1977 [R.T. 385-86, 389-90]. One month later her 19-year-old daughter, Kim, met the Petitioner [R.T. 381-82; App. 31]. Kim and the Petitioner fell in love [R.T. 377, 407; App. 32], and in July 1978, Petitioner moved into Bowling's home where her daughter Kim resided [R.T. 360, 382, 407; App. 32]. Kim may have assisted the Petitioner in alien smuggling [R.T. 366, 370; App. 33-34], and Bowling characterized Kim, her daughter and Petitioner's girlfriend, as a "junkie"

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[10]Counsel for Petitioner has lodged with the Clerk the certified list of the jury selection. "D1" means defense peremptory 1, and "G1" means Government peremptory 1.

[11]Lemmon, Howell, Frye, Glenn, Frazee, Stark, Akamatsu, Harder, Kennedy, Workman, May, and Kleeb.

[12]The general background of the case is summarized by the court of appeals at 614 F.2d 1352-53 [App. 37-40].

or heroin user [R.T. 410; App. 34]. During Petitioner's stay with Bowling, he did not contribute to rent, utilities, or food, because he did not have his own money [R.T. 361, 408-09; App. 32-33].

On the morning of 11 December 1978, three Mexicans, all cousins, without documentation entered illegally into the United States with the help of a guide ("coyote") and came to Bowling's residence [R.T. 250-53, 290-91, 316-19]. The guide knocked on the side door of the garage, and the Petitioner let them in [R.T. 253-55, 291-92, 319]. Two of the aliens testified that the Petitioner never spoke to them or gave them orders [R.T. 269, 298], and the third alien testified the Petitioner never said anything to him except outside the apartment in Los Angeles where he was told, "Go upstairs" [R.T. 327]. All other instructions were given by the unknown guide [R.T. 269, 298, 315-24].

In addition to Bowling, former co-defendant Falcon-Zavala testified for the Government that the Petitioner worked for Bowling in alien smuggling [R.T. 431]. The mysterious guide who was said to be in the apartment under continuous surveillance by federal agents was never found [R.T. 218-19, 285-86].

The Petitioner did not testify [R.T. 460, 534], and the defense argued that the testimony of Bowling and Falcon-Zavala was neither credible nor reliable and that Petitioner was not guilty simply because he had associated with alien smugglers [R.T. 529-53].

SUMMARY OF ARGUMENT

The right to trial by an impartial jury includes a reasonable opportunity to probe for bias or prejudice. In a

federal criminal case it is reversible error without a showing of prejudice for a court to refuse defense requested *voir dire* inquiry as to the jurors' attitudes towards the defendant's Mexican descent or race. A question as to "aliens" does not suffice. To insure adequate *voir dire* counsel, with knowledge of the facts of the case, should be permitted to supplement the judge's questioning. The perfunctory six-minute *voir dire* did not adequately probe for racial prejudice.

ARGUMENT

THE INADEQUATE *VOIR DIRE* BY THE TRIAL COURT IN REFUSING TO INQUIRE ABOUT RACIAL PREJUDICE WHEN A MEXICAN WAS CHARGED WITH AN IMMIGRATION OFFENSE WAS A CLEAR BREAK WITH ESTABLISHED PRECEDENT FOR THE FEDERAL COURTS.

> Solon compared laws to spiders' webs which stand firm when any light and yielding object falls upon them, while a larger thing breaks through them and makes off.[13]

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[13]Hicks, I *Diogenes Laertius: Lives of Eminent Philosophers* 59 (Loeb Classical Library 1972 Reprint).

Right to an Impartial Jury

In a federal criminal case the defendant is entitled to trial before an *impartial* jury. (Art. III, Sect. 2; Amend. VI).[14] Elemental fairness as embodied in the Due Process Clause of the Fifth Amendment, would insure that minimum safeguards are used to obtain an impartial jury free of prejudice. In *Peters v. Kiff,* 407 U.S. 493 (1972), this Court stated:

> "A fair trial in a fair tribunal is a basic requirement of due process." . . . The due process right to a competent and impartial tribunal is quite separate from the right to any particular form of proceeding.[15]

407 U.S. 493, 501 (citations omitted).

The origins of trial by jury are unclear, but its Constitutional inclusion was to prevent oppression by the Government.[16] The jury was not always a shield for the accused. It is first mentioned in the Constitutions of Clarendon (1164) as an accusatory body of 12 persons, the precursor of the grand jury, which acted when no individual would dare make a public accusation. The presentment jury evolved into the petit jury in which the jurors were essentially witnesses to the crime. The alternative of trial by ordeal may have appeared more palatable than a trial by one's accusers, so the accused was encouraged to elect a jury trial "on the

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[14]*In re Murchison,* 349 U.S. 133, 136 (1955); *Duncan v. Louisiana,* 391 U.S. 145, 157-58 (1968).

[15]Due process protects against an insane juror, *Jordan v. Massachusetts,* 225 U.S. 167, 176 (1912); an intimidated juror, *Moore ve. Dempsey,* 261 U.S. 86 (1923); or a media-influenced juror, *Irwin v. Dowd,* 366 U.S. 717 (1961).

[16]*Duncan v. Louisiana,* 391 U.S. 145, 151-55 (1968).

country" (*per patriam*) by undergoing pretrial penance (*peine forte et dure*). In 1341 a petty juror was challenged because he had served on the presenting jury, but the challenge was denied by the judge who said, "If the indictor be not there it is not good for the king." In 1352 a challenge to an indictor was allowed.[17] This was but the first step on the road to impartiality, for it was some time before the juror's function as a witness was terminated.[18]

By the time of Blackstone, both challenges for cause and peremptory challenges were well known.[19] Jurors could be challenged for a previous conviction, perjury, serfdom, consanguinity, affinity, enmity, or close friendship.[20] Challenges were given to remove prejudice and acquire an impartial jury.[21] "The theory of the law is that a juror who has formed an opinion cannot be impartial." *Reynolds v. United States,* 98 U.S. 145, 155 (1879). Racial prejudice could not be permitted to affect the composition of the jury. This Court in *Strauder v. West Virginia,* 100 U.S. 303, 309 (1880), recognized:

> It is well known that prejudices often exist against particular classes in the community, which sway the

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[17]Forsyth, *History of Trial by Jury* 192-208 (1852); Plucknett, *A Concise History of the Common Law* 127, 433 (5th ed. 1956); Pollock and Maitland, II *The History of English Law* 649 (2nd ed. 1952); Moore, *The Jury: Tool of Kings—Palladium of Liberty* (1973); Spooner, *Trial by Jury* (1852); Wells, "The Origin of the Petty Jury," 107 *Law Quar.Rev.* 347 (1911).

[18]Forsyth, *supra,* 158-167; Proffatt, *Trial by Jury* 43-45 (1877).

[19]4 Blackstone 352-54 (Tucker ed. 1803).

[20]Moore, *supra,* 42.

[21]Forsyth, *supra,* 175; Proffatt, *supra,* 198. Both authors trace the right of challenges in a criminal case to Roman times (*Lex Servilia* B.C. 104).

> judgment of the jurors, and which, therefore, operate in some cases to deny to persons of those classes the full enjoyment of that protection which others enjoy.

Prejudgment, even a limited inclination for or against a defendant, could seriously influence the outcome of a criminal case and must be carefully avoided.[22]

Right to *Voir Dire*

In an American criminal case both parties have the fundamental right to a critical and probing examination of prospective jurors.[23] In *Pointer v. United States,* 151 U.S. 396, 408-09 (1894), the first Justice Harlan stated:

> Any system for the impaneling of a jury that prevents or embarrasses the full, unrestricted exercise by the accused of that right must be condemned; and therefore

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[22]In *Clark v. United States,* 289 U.S. 1 (1933), a juror who alone held out for acquittal was convicted of contempt for not adequately explaining her contacts with the defendant. *Cf. In re Michael,* 326 U.S. 224, 228 (1945).

[23]Proffatt, *supra,* 219-20; ("The examination of jurors on the *voir dire* is looked upon by the practitioner as a very critical period of the procedure, when the greatest circumspection and discrimination are to be exercised.") Bermant and Shapard, *The Voir Dire Examination, Juror Challenges, and Adversary Advocacy* 7-8 (Federal Judicial Center 1978) ("In conclusion, we accept that, in certain circumstances, practitioners may have to employ the most vigorous *voir dire* and challenge practices simply to select a reasonable jury."); Cornish, *The Jury* 47 (1968) ("The system in the United States accepts that if a right of challenge is to be a real one under modern conditions, the litigants must be furnished with an opportunity to find out the antecedents and attitudes of the potential jurors.") Lord Devlin favors American *voir dire* to discover prejudice, for this practice is seldom used in English courts. Devlin, *Trial by Jury* 27-37 (1956).

> he cannot be compelled to make a peremptory challenge until he has been brought face-to-face, in the presence of the court, with each proposed juror, and an opportunity given for such inspection and examination of him as is required for the due administration of justice.

See United States v. Marchant, 12 Wheat. 480 (1827); *Connors v. United States,* 158 U.S. 408, 413 (1895).

In *Dennis v. United States,* 339 U.S. 162, 171-72 (1950), the Court held: "Preservation of the opportunity to prove actual bias is a guarantee of a defendant's right to an impartial jury." On the basis of that language the Court reversed a conviction where the trial court refused to interrogate the prospective jurors who were Government employees on the effect of a Presidential "Loyalty Order." *Morford v. United States,* 339 U.S. 258 (1950).

More recently this Court in preserving the unfettered right to exercise the peremptory challenge also approved the questioning of prospective jurors:

> Indeed the very availability of peremptories allows counsel to ascertain the possibility of bias through probing questions on the *voir dire* and facilitates the exercise of challenges for cause by removing the fear of incurring a juror's hostility through examination and challenge for cause.

Swain v. Alabama, 380 U.S. 202, 219-20 (1964).[24] The Court required more than mere mummery or the flaccid incantation of a litany of rhetorical questions. Merely going through the form of obtaining jurors' assurances of impartiality is not *voir dire.* Something more than a nod of the head

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[24]In *Swain* Justice White noted: "The *voir dire* in American trials tends to be extensive and probing, operating as a predicate for the exercise of peremptories, and the process of selecting a jury protracted." 380 U.S. 202, 218-19.

(sometimes no answer being construed as a response) to questions truly seeking no answer is required. Not only the right to challenge, but the right to question must be preserved.[25]

Fifty years ago defense counsel in a federal criminal case sought to inquire of the *venire* as to racial prejudice. The trial court summarily refused, and this Court in *Aldridge v. United States*, 283 U.S. 308 (1931), speaking through Chief Justice Hughes, reversed:

> The argument is advanced on behalf of the government that it would be detrimental to the administration of the law in the courts of the United States to allow questions to jurors as to racial or religious prejudices. We think that it would be far more injurious to permit it to be thought that persons entertaining a disqualifying prejudice were allowed to serve as jurors and that inquiries designed to elicit the fact of disqualification were barred. No surer way could be devised to bring the processes of justice into disrepute.

283 U.S. 308, 314-15.

In *Swain v. Alabama, supra,* the Court held:

> For the question a prosecutor or defense counsel must decide is not whether a juror of a particular race or nationality is in fact partial, but whether one from a different group is less likely to be. It is well known that these factors are widely explored during the *voir dire,* by both prosecutor and accused, *Miles v. United States,* 103 U.S. 304; *Aldridge v. United States,* 283

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[25]The English not only place little weight on *voir dire* but also have substantially curtailed peremptories, now limited to three. Baldwin and McConville, *Jury Trials* 91-92 (1979). In contrast, a recent effort to reduce the number of defense peremptory challenges from ten to six in a federal criminal case was rejected by Congress. Pub.L. 95-78; 91 Stat. 320 (30 Jul 77); 1977 *U.S. Code Cong. & Admin. News* 533.

U.S. 308. This Court has held that the fairness of trial by jury requires no less. *Aldridge, supra.*

380 U.S. 202, 220-21.

In *Ham v. South Carolina,* 409 U.S. 524 (1973), the Court held that the Due Process Clause of the Fourteenth Amendment necessitated *voir dire* as to racial prejudice in a case involving a black civil rights worker charged with an offense of possession of marijuana which may have been "planted."[26] Three years later in *Ristaino v. Ross*, 424 U.S. 589 (1976), the Court decided that although the Federal Constitution did not demand this inquiry in every state criminal case, it was mandated in federal criminal cases:

> Although we hold that *voir dire* questioning directed to racial prejudice was not constitutionally required, the wiser course generally is to propound appropriate questions designed to identify racial prejudice if requested by the defendant. Under our supervisory power we have required as much of a federal court faced with the circumstances here. See *Aldridge v. United States, supra;* cf. *United States v. Walker,* 491 F.2d 236 (CA 9) cert. denied, 416 U.S. 990 (1974); *United States v. Booker,* 480 F.2d 1310 (CA 7 1973).

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[26]In *Hamling v. United States,* 418 U.S. 87 (1974), the Court stated, "Those cases [*Aldridge* and *Ham*] held that in certain situations the judge must inquire into possible racial prejudices of the jurors in order to satisfy the demands of due process." 418 U.S. 87, 140.

424 U.S. 589, 597 n.9.[27]

The district court's failure to conduct any inquiry as to racial prejudice after an express request from the defense both before and after *voir dire* constitutes a clear violation of the *Aldridge-Ristaino* doctrine for federal courts.

The protection afforded by this inquiry as to race extends to a Mexican. In *Aldridge* the Court stated:

> The right to examine jurors on the *voir dire* as to the existence of a disqualifying state of mind has been upheld with respect to other races than the black race, and in relation to religious and other prejudices of a serious character.

283 U.S. 308, 313. In *Hernandez v. Texas,* 347 U.S. 475 (1954), Texas had attempted to state there were two racial classes—white and Negro—within the contemplation of the Fourteenth Amendment. This Court made it clear that discrimination on the basis of race or color, including delineation as to Mexican descent, was prohibited. *See also*

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[27]*Swain v. Alabama,* 380 U.S. 202, 204-05 (1964). The Ninth Circuit *Walker* decision involved a black defendant charged with forgery of United States Treasury checks in which case two of the Government's chief witnesses as well as three of the jurors were black. The refusal to ask the question as to racial prejudice was approved. In contrast, the Seventh Circuit *Booker* decision written by Justice Stephens (then circuit judge) reversed the conviction of a black defendant convicted by a jury with five blacks for failure to conduct an inquiry as to racial prejudice. Since *Ristaino* there is a split among the circuits as to whether in a federal criminal case upon request by the defense the question must be put to the prospective jurors concerning racial prejudice: *United States v. Rucker,* 557 F.2d 1046 (4th Cir. 1977); *United States v. Bowles,* 574 F.2d 970 (8th Cir. 1978); *United States v. Williams,* 612 F.2d 735 (3rd Cir. 1979); *Contra, United States v. Floyd,* 535 F.2d 1299 (D.C. Cir. 1976); *United States v. Polk,* 550 F.2d 1265 (10th Cir. 1977). *See also* Eclavea, *Voir Dire—Pretrial Publicity,* 28 A.L.R.Fed. 26, 68-69 (1976).

Castaneda v. Partida, 430 U.S. 482, 495 (1977); *White v. Regester,* 412 U.S. 755, 767 (1973). *Cf. United States v. Bear Runner,* 502 F.2d 908 (8th Cir. 1974) (the trial court with an Indian defendant did not adequately probe for latent racial prejudices).

The district court asked the prospective jurors if they had any feelings "about the alien problem" or "aliens" [R.T. 146-47; App. 17]. To the question about the alien problem a juror reacted to the name used for people to transport illegal aliens and the placement of them, but the district court did not even permit her to finish her response. Apparently the juror was concerned about the illegal aliens transported and the possibly unkind characterization of the transporters (*i.e.,* "coyote"). The second juror in responding to her feelings about aliens indicated that she could not be an impartial or fair juror. The remarks of both prospective jurors apparently were to aliens or persons being transported into the United States, but the inquiry never extended to or probed their attitude toward the Petitioner as to his race or Mexican descent (*i.e.,* color ethnicity). His citizenship was irrelevant.

More importantly, this Court in *Espinoza v. Farah Mfg. Co.,* 414 U.S. 86 (1973), held that the protection of Title VII of the Civil Rights Act of 1964 that prohibited discrimination on the basis of race or national origin was clearly distinguishable from discrimination on the basis of alienage.

Although the alienage of the Petitioner, if it had been raised at trial, might have been an appropriate area of inquiry, the defense, understandably, was more concerned with the jurors' attitudes on racial prejudice rather than American citizenship or lawful residence. The focus of the perfunctory inquiry tended to protect the Government's right to a fair trial by locating jurors who may have felt that laws penalizing poor people who come to the United States

seeking only a place to work were unfair and unjust. The sympathies inherent in the responses to the court's question related to the persons transported. The court's interruption and curtailment of the response of the first juror to the question intimated to others that the court did not want an answer. With these responses, the court's failure to conduct further inquiry or to grant defense counsel's repeated requests for this inquiry as to racial prejudice was error.

This case was a criminal enforcement of the Immigration and Nationality Act of 1952 which has been characterized as racist in itself.[28] The principal Government witness against the Petitioner was a white Anglo, and her testimony revealed that he lived in her house with her daughter as her daughter's lover and was supported by the mother. That relationship could have easily aggravated any latent racial antagonism of an Anglo juror towards a Mexican. In the context of this case there was both a constitutional due process violation (*Ham*) as well as a violation of the supervisory guidelines established by this Court for federal courts (*Aldridge*).

Not Harmless Error

The refusal to make any inquiry as to racial bias of the prospective jurors after Petitioner's timely request, an "essential demand of fairness," requires reversal. *Aldridge v. United States,* 283 U.S. 308, 315 (1931); *Ham v. South Carolina,* 409 U.S. 524, 529. Without the questioning there may have been jurors harboring racial prejudice towards the

[28]Teitelbaum, "Right versus Right: Immigration and Refugee Policy in the United States," 59 *Foreign Affairs* 21, 23, 26, 31-32 (Fall 1980).

Mexican defendant that can never be adequately evaluated from the cold record. Because trial courts would be scandalized by tolerating the potential for racial prejudice on a jury, no showing of actual prejudice should be required.[29]

Especially in federal proceedings, even if there is no proof of actual bias in the tribunal, this Court has held that due process is denied by circumstances that create the likelihood or appearance of bias. *Peters v. Kiff,* 407 U.S. 493, 502 (1972).[30]

Contemporary Federal *Voir Dire* Practice

In the exercise of this Court's supervisory authority over the federal judiciary may the six-minute *voir dire* of the prospective jurors by the judge be treated as an adequate inquiry to ensure an impartial jury under Rule 24(a)?[31]

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[29]The majority of circuits would not treat the failure to inquire as to racial prejudice as harmless. *United States v. Carter,* 440 F.2d 1132, 1134 (6th Cir. 1971); *United States v. Booker,* 480 F.2d 1310, 1311 (7th Cir. 1973); *United States v. Robinson,* 485 F.2d 1157, 1159 (3d Cir. 1973); *United States v. Bowles,* 574 F.2d 970, 973 (8th Cir. 1978); *United States v. Williams,* 612 F.2d 735, 737 (3d Cir. 1979); *but see United States v. Johnson,* 527 F.2d 1104, 1106-07 (4th Cir. 1975); *United States v. Floyd,* 535 F.2d 1299, 1302 (D.C. Cir. 1976).

[30]In *Swain v. Alabama,* 380 U.S. 202, 219 (1965), this Court held: "The denial or impairment of the right [to probe on *voir dire*] is reversible error without a showing of prejudice [citations omitted.]."

[31]Rule 24(a), Fed.R.Crim.P., states:

> The court may permit the defendant or his attorney and the attorney for the government to conduct the examination of prospective jurors or may itself conduct the examination. In the latter event the court shall permit the defendant or his attorney and the attorney for the government to supplement the examination by such further inquiry as it deems proper or shall itself submit to the prospective jurors such additional questions by the parties or their attorneys as it deems proper.

For background on the drafting and the implementation of this rule, *see* Orfield, *Trial Jurors in Federal Criminal Cases,* 29 F.R.D. 43 (1961).

In *Ham,* this Court stated that either of the brief questions proposed by the petitioner would have been sufficient, and in the context of a state case the Court was reluctant to establish any number or particular form of the questions. In this case if the trial court had asked: "You wouldn't be prejudiced against the defendant because of his race or being Mexican, would you?", would that question have been adequate? Even the question: "Do you have any racial prejudice?" is not a valid inquiry on such a sensitive subject. One question may be sufficient in the total context of the *voir dire,* but hopefully this Court would not place its imprimatur on a useless and ineffective form question.

It takes time to discover latent prejudice, especially racial prejudice,[32] which can only be properly explored with knowledge of the case that the court often lacks. The court should have permitted a more expanded, but not necessarily uncontrolled, *voir dire* by counsel to meet the rudimentary requirements of due process. As a practical matter, there was no *voir dire* in this case, and the atmosphere of "rush to judgment" permeated both *voir dire* and the trial. The six-minute questioning in this case may be an extreme example, but 15-minute *voir dires* are not uncommon in the federal courts. This Court should restructure the judicial approach to *voir dire* in federal courts because of the practically unreviewable discretion given to the district judge.

For the year ending 30 June 1980, there were 3,418 federal criminal jury trials. As of that date there were 516

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[32]For example, *see* the 12 tests for racial prejudice suggested by Brigham, Woodmansee, & Cook, "Dimensions of Verbal Racial Attitudes; Interracial Marriage and Approaches to Equality," 32 *Journal of Social Issues* 9-21 (1976).

authorized judicial district court judgeships, and approximately seven criminal jury trials per authorized judgeship.[33] Given the number of jury trials per judge in the federal court system, this Court, in the exercise of its supervisory power, should provide counsel an opportunity to inquire into the backgrounds of the jurors so as to properly exercise challenges for cause and peremptory challenges.[34] The 1977 survey of federal judges on *voir dire* examination revealed that 75% of all federal judges exclude oral participation by counsel during *voir dire.*[35] As to the duration of the typical criminal *voir dire,* 92% of the surveyed federal judges indicated it took less than two hours, and 65% indicated less than one hour, for an overall average of 50 minutes.[36] Judge-conducted *voir dire,* excluding attorney participation, increased the duration of *voir dire* (average 71 minutes), yet counsel-conducted *voir dire* with the judge not present was the shortest (average 45 minutes).[37]

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[33]For the year ending 30 June 1980 there was a total of 7,353 jury trials, including civil cases, or 15 jury trials per authorized judge. *1980 Annual Report of the Director,* Administrative Office of the U.S. Courts, Table C-8. For this same year there was an 11.5% decline in new criminal filings. *Id.* 4. As of 30 June 1980 thee were 32 district judge vacancies (*id.* 2), but these vacancies do not affect the number of jury trials per judge.

[34]*American Bar Association Standards Relating to the Administration of Criminal Justice: Trial by Jury,* Standard 15-2.4 (Approved Draft 1978); *Uniform Rules of Criminal Procedure,* Rule 512(b) (1974).

[35]Bermant, *Conduct of the Voir Dire Examination: Practices and Opinions of Federal District Judges* 5 (Table 1) (Federal udicial Center 1977).

[36]*Id.* 13 (Table 4).

[37]*Id.* 14 (Table 6).

Traditionally, the principal objection to counsel's participation in *voir dire* in the federal criminal courts has been that counsel takes too long. In the past there have been some unwarranted and protracted *voir dires,* perhaps in some instances for possibly improper motives (didactic), but Bermant noted, "The median estimated duration for criminal case examinations was 52 minutes with oral participation [of counsel] and 51 minutes without [by the judge alone]."[38] A one-minute difference does not appear to justify the total exclusion of counsel, and the court's ability to require *voir dire* questions to be presented in advance could preserve the judge's now existing authority under Rule 24(a) to restrict improper questioning by counsel.

In this case counsel requested 30 minutes supplemental *voir dire.* The court's summary denial of counsel's participation without any reasons or statements, aggravated by the court's own cursory inquiry, fell below any minimum standard that should be expected of a federal court. This Court should permit counsel to request at least 30 minutes *voir dire* (per side) subject to the questions being first reviewed by the trial judge.[39] In the struck jury system, predominantly used in federal courts, there are approximately 30 prospective jurors called, and the allocation of 30 minutes would permit counsel one minute per juror.

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[38]*Id.* 14 n.20.

[39]The Ninth Circuit Judicial Conference on 14 July 1980, although rejecting the concept of counsel-conducted *voir dire* in criminal and civil cases, did adopt a resolution recommending that "in criminal cases counsel for either side be given a minimum reasonable opportunity (*i.e.,* 15 to 30 minutes) to supplement the *voir dire* questioning by the judge." The Ninth Circuit Judicial Council referred this to the Conference of Chief Judges of the Ninth Circuit.

The pendulum has swung too far. *Voir dire* has been reduced to a ritual.[40] This Court must provide some outer limit guidelines for the unfettered discretion now exercised by federal judges over this critical stage of the trial.

The *voir dire* question proposed in this case was partially open-ended. It permitted something more than a simple "yes" or "no" answer. This probing inquiry should not be reduced to a single formula question.[41] The standard question often asked by the judge is, "Can you be fair?" To that question the jurors invariably answer in the affirmative. This is not the adequate examination or searching fundamental to American jury trials. In *United States v. Dellinger,* 472 F.2d 340, 367 (7th Cir. 1972), the court stated:

> The government's position must rest upon an assumption that a general question to the group whether there is any reason they could not be fair and impartial can be relied on to produce a disclosure of any disqualifying state of mind. We do not believe that a prospective juror is so alert to his own prejudices. Thus it is essential to

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[40]"However the very brief examination durations reported by many judges suggest a routinized or ritualized *voir dire* practice . . . . Certainly there is nothing in the theory or practice of behavioral science that leads us to believe subtle bias or prejudice can be accurately assessed so quickly." Bermant, *supra,* 25. *See also* Bermant and Shapard, *supra,* 26-27.

[41]For some excellent materials that provide samples of effective inquiry as to racial prejudice, *see* Bonora and Krauss, *Jurywork: Systematic Techniques* 43-45, 155-56, 178-84 (1979); and Ginger, *1980 Supplement to Jury Selection and Criminal Trials: New Techniques and Concepts* 298-305, 391-402. Both of those texts are for defense lawyers, but the former presiding judge of the Los Angeles County Superior Court has set forth some minimal types of questions that could be used to explore for racial prejudice. Wenke, *The Art of Selecting a Jury* 66-68, 106-16 (1979).

explore the backgrounds and attitudes of the jurors to some extent in order to discover actual bias, or cause.[42]

This Court may not be able to dictate the type or form of the questions but should require that the questioning allow jurors to sufficiently reveal their attitudes, giving counsel the chance to further explore possible areas of prejudice or bias and thus have a basis upon which to exercise his challenges.[43]

Voir dire questioning could be further expedited by providing counsel biographical information on the prospective jurors prior to trial [*see* 28 U.S.C. §1867(f); *Test v. United States,* 420 U.S. 28 (1975)]. The use of a legal attitudes questionnaire by prospective jurors that might then be furnished to counsel before trial has been suggested.[44] If basic information about jurors is presented to counsel at least 24 hours prior to trial, the *voir dire* can be both efficient and effective. Few counsel submit more than 50 *voir dire* questions. A 30-minute time limitation would permit counsel to select and phrase those questions for the *venire* most pertinent to the case. This procedure, unless the judge is absent, would be subject to judicial supervision.

The American jury today is the modern version of a trial

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[42]In *United States v. Bear Runner,* 502 F.2d 908, 912 (8th Cir. 1974), the court stated:

> In the instant case, the court's single question concerning racial bias was not only general in scope but was made to the prospective *veniremen* as a group. The effect was more like a monologue by the court than a probing examination of the jurors.

[43]Adequate *voir dire* can reveal defects not otherwise discernible under the now tolerated perfunctory questioning. *See United States v. Eubanks,* 591 F.2d 513 (9th Cir. 1979).

[44]Note, "Juror Bias—A Practical Screening and the Case for Permitting Its Use," 64 *Minn.L.Rev.* 987 (1980).

"on the country," that is, by the average citizen with his or her inherent strengths and weaknesses, called into service to review the process of criminal sanctions. This is the option to trial by government officials (*i.e.*, judges). What the prospective jurors see in the courtroom will teach them much of how our government functions. More importantly, the nature of the questioning by the judge to a large extent predetermines the role or function of jurors in the proceedings.[45] If it is perfunctory and meaningless, jurors get the "message." If it is a ceremonial artifice preceding the preferred verdict of guilty, their individual responsibility to decide the issues will be relaxed to conform to the verbally or nonverbally telegraphed, anticipated outcome. When the signs sent out are "Let's get this case over as quickly as possible because it really isn't very much," it adversely affects the defendant and corrodes the principle of impartiality.[46]

In bygone days a visitor to this country made some then-perceptive, perhaps idealistic, observations about the jury as a political institution:

> The jury . . . serves to communicate the spirit of the judges to the minds of all the citizens; and this spirit, with the habits which attend it, is the soundest preparation for free institutions. It imbues all classes *with a respect for the thing judged, and with the notion of right.* If these two elements be removed, the love of independence is reduced to a mere destructive passion. It teaches men to practice equity; *every man learns to judge his neighbor as he would himself be judged*....[47]

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[45]Asking questions and ruling on challenges, the trial judge serves as a guide for the juror as an impartial factfinder. Bermant, *supra,* 25-26.

[46]Note, "Judges' Nonverbal Behavior in Jury Trial: A Threat to Judicial Impartiality," 6 *Va.L.Rev.* 1226 (1975).

[47]de Tocqueville, I *Democracy in America* 336-37 (Schocken, 1961 ed.) (emphases added).

The *pro forma voir dire* denigrates the importance of the role of the juror called into public service to judge his fellow. The qualifications of the office are not much, because the questioning is so short. The judge does not want answers other than in compliance with an antiquated process of questioning that apparently serves no purpose. Supermarket justice—the speed, not the object—is all important. The person on trial is merely an unfortunate cog in a master apparatus that cares little for his views of the impartiality of his judges. He means little. Because he is Mexican, he could never be like them.

CONCLUSION

Because of the standardless discretion that now exists for federal judges concerning *voir dire,* this Court in the exercise of its supervisory power should require federal courts to permit *voir dire* by counsel for a period not to exceed 30 minutes each side and should require the use of open-ended questions or techniques that will ensure proper probing as to the attitudes of the jurors so as to discover bias or prejudice, especially racial prejudice. Because the opinion of the lower court conflicts with established federal precedent, it is requested that the judgment be reversed.

Respectfully submitted,

/s/John J. Cleary
JOHN J. CLEARY
Federal Defenders of San Diego Inc.
225 Broadway, Suite 855
San Diego, California 92101
(714) 234-8467
FTS 895-5240

Court-appointed Counsel for Petitioner

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OCTOBER TERM, 1980

HUMBERTO ROSALES-LOPEZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

WADE H. MCCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

ANDREW L. FREY
Deputy Solicitor General

GEORGE W. JONES
Assistant to the Solicitor General

JOHN F. DEPUE
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

QUESTION PRESENTED

Whether the trial judge erred in refusing to ask prospective jurors if petitioner's race or Mexican descent would influence their consideration of the case.

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OPINION BELOW

The opinion of the court of appeals (J.A. 37-50) is reported at 617 F.2d 1349.

JURISDICTION

The judgment of the court of appeals was entered on March 20, 1980. A petition for rehearing was denied on May 12, 1980 (Pet. App. B). The petition for a writ of certiorari was filed on May 20, 1980, and was granted on October 6, 1980 (J.A. 51). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of California, petitioner was convicted on one count of conspiracy to conceal, harbor, shield, and illegally transport aliens, in violation of 18 U.S.C. 371 (Count 1); three counts of transporting illegal aliens, in violation of 8 U.S.C. 1324(a)(2) (Counts 2-4); and three counts of concealing, harboring, and shielding aliens, in violation of 8 U.S.C. 1324(a)(3) (Counts 5-7). Petitioner was sentenced to serve consecutive prison terms of 18 months on the conspiracy count and five years on each of the six substantive counts.[1] The district court suspended the 30-year sentence on the substantive counts and imposed a five-year term of probation to follow petitioner's release from custody

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[1] The statement in the decision of the court of appeals (J.A. 37) that petitioner was sentenced to five years' imprisonment on each count is wrong.

(J.A. 35-36; Sentencing Tr. G-H). The court of appeals affirmed (J.A. 37-50).[2]

2. As summarized by the court of appeals (J.A. 38-40), the evidence at trial showed that petitioner was an active participant in an illegal alien smuggling operation in Southern California. During the evening of December 10, 1978, one of petitioner's "guides" (Tr. 372) met in Tijuana with three men who had agreed to pay $200 apiece to be smuggled into the United States (Tr. 251, 315). The four traveled by bus from Tijuana to a place near an airport and then unlawfully crossed the international border into the United States on foot (Tr. 250-252, 291, 315). After crossing the border, the guide transported the three men by automobile to a house in Imperial Beach that petitioner shared with co-defendant Virginia Bowling (Tr. 252-255, 291-292, 316-319, 360). Petitioner was waiting and admitted the four men into the garage (Tr. 255, 291-292, 319). The next morning, petitioner concealed the three aliens and the guide in the trunk of a car (Tr. 256,

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[2] Petitioner was committed to the custody of the Attorney General on April 2, 1979; the 18-month sentence on the conspiracy count therefore expired on October 2, 1980. The Immigration and Naturalization Service deported petitioner on October 10, 1980. According to petitioner's counsel, his "true" name is "Jesus Navarro" (Sentencing Tr. C; see also Tr. 360, 376). But petitioner was deported under the name "Martin Gomez-Gonzales" (Br. 2 n.5). Petitioner was deported because he had illegally entered the United States by presenting the alien registration card of Humberto Rosales-Lopez, which he had purchased in Mexico for $100, and because he had no valid entry document of his own. Although petitioner's term of probation will not expire until 1985, "probation supervision is waived * * * while he remains in Mexico" (J.A. 36; Sentencing Tr. H).

292-293, 322). Bowling drove the vehicle containing the four aliens north on Interstate Five and through the San Clemente checkpoint (Tr. 372-373, 232-233, 195-196); petitioner followed in another vehicle (Tr. 373-374, 195-196; see also *id.* at 231-232). After passing the checkpoint, Bowling and petitioner exchanged cars (Tr. 374-375); the guide drove the car containing petitioner and the concealed aliens to an apartment building in Los Angeles (Tr. 196, 294).

When they arrived at the apartment building, the aliens were released from the trunk of the car, and petitioner directed them up the back stairs to a second floor apartment (Tr. 327, 196, 213). At about 12:30 p.m., petitioner, co-defendant David Falcon-Zavala, and one of the aliens who had been transported from Imperial Beach left the apartment to get money to pay petitioner's fee (Tr. 197-198, 246, 260-261, 446, 451). Shortly thereafter, agents of the Immigration and Naturalization Service, who had followed petitioner from the Imperial Beach residence to Los Angeles and maintained surveillance of the apartment (Tr. 192-198, 232-235, 254), arrested petitioner and his cohorts (Tr. 246-247).

3. As authorized by Rule 24(a), Fed. R. Crim. P., and in accordance with the procedure ordinarily used in the Southern District of California (J.A. 40), the trial judge conducted the *voir dire* examination of the jury venire.[3] Petitioner submitted a total of 26 questions for the trial court to ask each of the prospective jurors (J.A. 9-11). The trial judge asked the substance of approximately half of the questions submitted by petitioner (compare J.A. 14-21 and Tr.

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[3] The court rejected petitioner's counsel's request to "personally voir dire the prospective jurors." See J.A. 9, 13; Tr. 140.

142-151 with J.A. 10-11: Questions 1, 2, 3, 4, 5, 8, 9, 10, 11, 13, 15, and 21).[4] Among the questions the trial judge refused to ask was number seven:

> Would you consider the race or Mexican descent of Humberto Rosales-Lopez in your evaluation of this case? How would it affect you?

(J.A. 10, 25; Tr. 157).[5] Nevertheless, the trial judge began the *voir dire* by introducing petitioner to the venire, outlining the nature of the charges, and explaining that the purpose of the questions to be asked was "to make sure that there are no underlying prejudices, there are no underlying reasons why you can't sit as a fair and impartial juror[,] if chosen to do

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[4] The court refused to ask question number 24, "Would you hold it against the defendant who did not testify" (J.A. 11), for the reason that the question would be adequately covered in his instructions to the jury (J.A. 26; Tr. 158). See Tr. 565, 559.

[5] The court also refused to ask the jurors: what questions they would ask themselves if they were on trial (J.A. 11: Question 26); whether they knew any of the jurors better than any other (J.A. 11: Question 19); how many years of formal education they had had (J.A. 11: Question 14); whether any of them spoke Spanish (J.A. 11: Question 23); whether any of them had been the victim of a crime (J.A. 11: Question 16); whether any of them or their close friends had ever testified at a criminal trial or before a grand jury (J.A. 11: Question 17); whether the fugitive status of a co-defendant would influence their evaluation of the case against petitioner (J.A. 11: Question 22); whether they would "feel an obligation to reach a verdict because that was the vote of the majority" (J.A. 11: Question 25); whether they or any of their friends had ever employed illegal aliens (J.A. 10: Question 6); whether any of them had ever served on any jury (J.A. 11: Question 18), and, presumably only if they had, whether they had discussed the verdict after the trial with the parties, counsel, or witnesses in the case (J.A. 11: Question 20).

so in this case" (J.A. 14-15; Tr. 142). After again pointing out the nature of the charges against petitioner, the trial judge asked whether any of the jurors had "any feelings about the alien problem at all" (J.A. 17; Tr. 146; cf. J.A. 10: Question 5). Because of her response to this question, one member of the venire was excused (J.A. 17; Tr. 146). The judge then broadened his inquiry: "Do any of you have any particular feelings one way or the other about aliens or could you sit as a fair and impartial juror if you are called upon to do so" (J.A. 18; Tr. 146-147). Because of her response to this question, another prospective juror was excused (J.A. 18; Tr. 147). Finally, in concluding his examination of the venire, the trial judge asked:

> Does any reason occur to anyone of you why you could not sit in this case as a fair and impartial juror, any reason whatsoever?

(J.A. 21; Tr. 151). No juror responded.

When the examination was completed, the court gave counsel for petitioner and the government an opportunity to explain why further questioning was necessary (J.A. 24; Tr. 156). In support of his position that question seven should have been asked, petitioner's counsel said only that *Aldridge* v. *United States*, 283 U.S. 308 (1931), requires the "explor-[ation] [of] all racial antagonism against my client because he happens to be of Mexican descent" (J.A. 25; Tr. 157).

After petitioner and the government exercised their peremptory challenges, the jury was sworn and seated (J.A. 27-28; Tr. 160-161).

4. On appeal, the Ninth Circuit affirmed the conviction. The court rejected petitioner's contention

that failure to ask a specific question concerning possible bias because of his Mexican ancestry was reversible error *per se* (J.A. 43). Although noting that both the Eighth Circuit and the Third Circuit appear to require "that a racial prejudice question * * * be put to the venire in all cases where the defendant is a member of a minority group" (J.A. 42), the court declined to follow those decisions. Instead, the court held that because there was no "indication that prejudice [was] likely to arise, or that the trial [would] have racial overtones" (*ibid.*), the refusal to ask the question requested by petitioner was not reversible error. Further, the court found "that the voir dire in this case adequately probed the venire for potential bias on all issues" (*id.* at 43). The court of appeals also observed that the statement in *Ristaino* v. *Ross*, 424 U.S. 589, 597 n.9 (1976), suggesting that a question specifically addressed to potential race bias must be asked by a federal court if requested by a black defendant charged with a crime of violence against a white victim, does not govern this case: "[T]he facts of *Ristaino* presented a greater likelihood of prejudice than do the facts of the present case" (J.A. 42).

SUMMARY OF ARGUMENT

The specific issue in this case is whether the district court committed reversible error when it declined to ask the prospective jurors during *voir dire* whether they would consider petitioner's race or Mexican descent in their evaluation of the case. The Court may also desire to use this occasion to address the broader question whether it should, in the exercise of its supervisory powers over the conduct of trials in the federal courts, establish a general re-

quirement that inquiry into racial or national origin bias of prospective jurors be undertaken whenever requested by a criminal defendant.

1. Any claim that the failure to make the requested inquiry in the present case violated petitioner's constitutional rights is wholly insubstantial. This is not a case in which the defendant's ancestry or national origin was "inextricably bound up with" the issues at trial. *Ristaino* v. *Ross*, 424 U.S. 589, 597 (1976). The offenses with which petitioner was charged were essentially victimless crimes. At trial, petitioner did not suggest that his prosecution was motivated by any civil rights activities on behalf of Mexicans or Mexican-Americans or any other activities unrelated to the crimes charged. If the Constitution did not require the propounding of *voir dire* questions regarding potential racial bias on the part of the jurors in *Ristaino*, which involved a black defendant charged with a crime of violence against a white victim, it plainly could not require such questions in the present case.

2. Even though a failure to undertake requested *voir dire* regarding potential racial bias may not be constitutional error in a particular case, it is clear from the holding in *Aldridge* v. *United States*, 283 U.S. 308 (1931), and the dictum in *Ristaino*, *supra*, 424 U.S. at 597 n.9, that there nonetheless may be error as a matter of nonconstitutional federal common law. Whether there is such error involves essentially the same type of inquiry as the constitutional analysis, but there is a lower threshold at which questioning about racial bias is required.

Thus, *Aldridge* and *Ristaino* make clear that some questioning directed at the general subject of racial bias is necessary in federal prosecutions involving interracial crimes of violence. There is nothing in either decision, however, that establishes a *per se*

rule requiring such inquiry in every case involving a defendant of an identifiable racial or ethnic minority group. Indeed, the discussion in *Ristaino* (424 U.S. at 596 n.8) appears to cast considerable doubt on the appropriateness of any *per se* rule.

In the instant case, there is little to suggest that petitioner's race or national origin was likely to play any material role in the jury's deliberations. The offenses charged were victimless crimes, the witnesses against petitioner were Mexican as well as "Anglo," and petitioner's defense did not depend at all on his ancestry or nationality. Indeed, in the colloquy regarding *voir dire*, petitioner pointed to nothing about the specifics of this case that would suggest the need for the proposed questioning, relying instead simply on the erroneous assertion that he was entitled to have his question propounded under a *per se* rule.

The conduct of *voir dire* is committed by the Federal Rules of Criminal Procedure to the sound discretion of the trial court, and there is no basis in this case for concluding that this discretion was abused. In fact, the court dealt effectively with the question of potential bias by asking the jurors about their attitudes toward aliens and the problem of illegal immigration. There is no tenable basis for speculating that petitioner's proposed question would have been any more effective in rooting out potential bias or assuring him a fair trial.

3. It is within the proper realm of this Court's supervisory powers to adopt a *per se* rule on this type of subject if it believes such a rule will usefully contribute to the fair and efficient administration of justice in the federal courts. Nevertheless, there is some question whether this particular requirement

should be promulgated in the context of adjudication, since the Federal Rules already treat the subject of *voir dire* and commit the matter to the discretion of the district court.

In any event, we believe that, while neither the costs nor the benefits of a *per se* rule would be substantial, the balance tips somewhat against the desirability of such an approach. A *per se* rule would reduce the need to litigate the issue on a case-by-case basis, perhaps accomplishing some slight amelioration of the workload of federal courts. But we are skeptical that specific questioning regarding racial or similar bias would be effective in achieving any meaningful improvement in the fairness of juries. Moreover, while brief questioning on the subject would probably be quite harmless, any more substantial probing to uncover latent bias, in cases where race or national origin is not reasonably central, runs a danger of needlessly injecting such issues into the case, as well as unnecessarily discomfiting prospective jurors by public probing of their attitudes on sensitive subjects.

If the Court does elect to announce a new *per se* rule in this case, any such rule should be prospective only. Such a rule would be a prophylactic measure of a quasi-legislative nature; its adoption would not reflect error in petitioner's case, and in the absence of any such error, reversal of his conviction would be wholly inappropriate.

4. Finally, even were this Court to conclude that the district court abused its discretion in this case by failing to propound the inquiry requested by petitioner, any such error was harmless in the circumstances here and does not warrant reversal of his conviction. This is so both because the questions that were asked during *voir dire* were largely effective to

deal with potential bias stemming from petitioner's Mexican ancestry, and also because the evidence against petitioner was so strong that one may conclude with reasonable assurance that his conviction was not the product of any hidden juror bias that might have been brought to light by the questions he requested.

ARGUMENT

THE TRIAL COURT'S REFUSAL TO ASK THE VENIRE A SPECIFIC QUESTION CONCERNING PETITIONER'S ANCESTRY WAS NOT REVERSIBLE ERROR

A. There Was No Error Of Constitutional Magnitude

In *Ham* v. *South Carolina*, 409 U.S. 524 (1973), this Court held that a black civil rights activist well known in his community for his work with the Southern Christian Leadership Conference and the Bi-Racial Committee of the City of Florence was constitutionally entitled to have the trial judge ask the venire a brief question "sufficient to focus the attention of prospective jurors on any racial prejudice they might entertain" (*id.* at 527). The defendant had been charged with possession of marihuana in violation of state law. At trial, his defense was that "law enforcement officers were 'out to get him' because of his civil rights activities, and that he had been framed" (*id.* at 525). *Ham* does not, however, establish a constitutional rule of "universal applicability." *Ristaino* v. *Ross*, *supra*, 424 U.S. at 596. Only if issues of race are "inextricably bound up with" the issues that will arise at trial is a court constitutionally required to inquire specifically as to the possibility of racial prejudice. *Id.* at 597. Otherwise, "the State's obligation to the defendant to impanel an impartial jury * * * can be satisfied by less than an inquiry into a

specific prejudice feared by the defendant." *Id.* at 595 (footnote omitted).

Petitioner's national origin was not "inextricably bound up with" the questions at trial. Petitioner was charged with conspiracy to smuggle illegal aliens into the United States in violation of 18 U.S.C. 371 and six substantive counts of harboring and transporting illegal aliens in violation of 8 U.S.C. 1324. His defense at trial was that his partners in the criminal enterprise testified falsely against him and that he was merely an unwitting accomplice in the offenses (see Tr. 177-183, 531-535, 538-553).[6] Petitioner offered no evidence in support of this theory. The jurors understandably accepted the strong and uncontradicted evidence offered by the government and inferred that petitioner knowingly and willfully participated in the conspiracy as well as the substantive crimes charged.

Petitioner suggests (Br. 18 & n.28) that because the Immigration and Nationality Act of 1952 has "been characterized as racist" a specific inquiry concerning his national origin was constitutionally required. Whether the Immigration Act of 1952 is "racist" was not an issue at trial. Petitioner at no time suggested to the jury that he should be acquitted of the crimes charged because the Act was "racist." Therefore, that the legislation enacting most of the particular offenses charged has been "characterized as racist" is of no consequence. Even if the characterization were accurate, it would provide no basis

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[6] Petitioner also argued that he should be acquitted of harboring and transporting one of the aliens because the alien's name was misspelled in the indictment (Tr. 535-536).

for holding that a specific inquiry concerning petitioner's national origin was constitutionally required.[7]

Next, petitioner argues (Br. 18) that because the "principal Government witness against [him] was a white Anglo [Bowling]," the inquiry concerning his national origin was constitutionally required. The race or national origin of a witness against the defendant can surely be of no greater constitutional significance than the race of the victim. In *Ristaino*, this Court expressly rejected the contention that "[t]he mere fact that the victim of the crimes alleged was a white man and the defendants were [black]" was sufficient to invoke the constitutional rule announced in *Ham*. *Ristaino* v. *Ross*, *supra*, 424 U.S. at 597. The same conclusion is required *a fortiori* in this context.[8] Petitioner never suggested that Bowling's testimony was motivated by his Mexican ancestry.

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[7] Petitioner, of course, did not suggest to the trial court that the inquiry was required in this case because of the general character of the Immigration Act.

[8] Petitioner asserts (Br. 18) that "any latent racial antagonism of * * * Anglo juror[s] towards * * * Mexican[s]" could have been "aggravated" by Bowling's testimony that he "lived in her house with her daughter as her daughter's lover and was supported by * * * [Bowling]." While such a fact, if central to the issues at trial, might tend to support the appropriateness of an inquiry into potential juror bias, it is not grounds for relief in the present case. To begin with, that testimony was elicited by petitioner himself (J.A. 31-33; Tr. 397-408), but petitioner never suggested to the trial judge during the colloquy about *voir dire* that his intention to elicit such testimony was a reason for asking question seven (see J.A. 25; Tr. 157). Further, neither petitioner's living arrangements nor his romantic involvement with Bowling's daughter was an issue in this trial, and the brief passing reference to these matters seems to us unlikely to have had an untoward influence on the jury's deliberations.

Rather, his attack on Bowling's credibility was based on her admitted alien smuggling activities and her asserted agreement with the government to testify in exchange for leniency (see Tr. 182-183, 534, 538-539, 540-542, 547).[9] In addition, with one minor exception, there was no reference to petitioner's Mexican ancestry anywhere in the testimony of the witnesses or the arguments of counsel.[10]

B. The Failure To Make The Specific Inquiry Requested By Petitioner Was Not Error As A Matter Of Nonconstitutional Federal Law

1. There Is No Existing Federal Rule Requiring Inquiry Into Potential Race Or National Origin Bias Whenever Requested By A Criminal Defendant

This Court's decision in *Aldridge* v. *United States*, *supra*, and dictum in *Ristaino* v. *Ross*, *supra*, 424 U.S. at 597 n.9, indicate that there are some circumstances in which a federal court must ask prospective jurors a specific question concerning potential racial prejudice even if such a question is not constitutionally required.[11] The difference between the federal

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[9] Petitioner attacked the credibility of Falcon-Zavala and the three illegal aliens on similar grounds (see Tr. 182, 183, 534, 540-542, 547, 551). As to the INS agents who testified against him, petitioner simply argued that although their testimony was credible, their observations were consistent with innocence (Tr. 540-541).

[10] An INS agent testified that after Bowling and petitioner had exchanged cars, he saw two "male Mexican Latins" in the front seat of the car used to transport the illegal aliens to Los Angeles (Tr. 234). Petitioner was the man sitting on the passenger side of the car.

[11] *Aldridge* has come to be regarded as a holding that questions *specifically* addressed to potential racial prejudice may sometimes be required in federal court. See, *e.g.*, *Ristaino* v. *Ross*, *supra*, 424 U.S. at 597 n.9; *Ham* v. *South Carolina*,

common law rule adopted in *Aldridge* and the constitutional rule applied in *Ham* is, we believe, quantitative and not qualitative. That is, the degree to which a case must implicate race or national origin is less under the federal common law standard than under the constitutional standard, but the analysis is essentially the same under either. While a specific question is constitutionally required only if issues of race are "inextricably bound up with" (*Ristaino* v. *Ross*, *supra*, 424 U.S. at 597) the issues at trial, under the federal common law standard a specific inquiry should be made whenever it is requested and the facts of the case or the nature of the charge or the defense carry substantial potential for activating racial bias among the jurors. The likelihood that racial bias will be a significant factor in the trial remains the touchstone of both standards, with discretion reposing in the trial court to deal with the particular circumstances of the case before it, rather than being bound by any automatic or *per se* rule.

Thus, this Court has never suggested that a federal district court must ask specific questions concerning race or national origin whenever requested to do so by the defendant, without regard to the circumstances of the case. Nevertheless, some courts of appeals have erroneously relied on *Aldridge* to support a sweeping *per se* rule, requiring questions specifically

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supra, 409 U.S. at 526. It should be noted, however, that on its facts the only question presented in *Aldridge* was whether some question "cover[ing] the subject" was required (283 U.S. at 311). The dictum in *Ristaino* clearly suggests the view that a specific question concerning racial prejudice is required in federal courts when requested by a black defendant who is charged with a crime of violence against a white victim (the holding in *Ristaino* is that the Constitution does not require such a question under those circumstances).

directed to racial prejudice whenever the defendant is a member of a minority group. See, *e.g.*, *United States* v. *Carter*, 440 F.2d 1132, 1134-1135 (6th Cir. 1971); *United States* v. *Gore*, 435 F.2d 1110, 1111-1112 (4th Cir. 1970); *Frasier* v. *United States*, 267 F.2d 62, 66 (1st Cir. 1959).[12] The holding in *Aldridge* contains no such rule. The passage generally cited as supporting the broad rule is as follows (283 U.S. at 314-315):

> The argument is advanced on behalf of the Government that it would be detrimental to the administration of the law in the courts of the United States to allow questions to jurors as to racial or religious prejudices. We think that it would be far more injurious to permit it to be thought that persons entertaining a disqualifying prejudice were allowed to serve as jurors and that inquiries designed to elicit the fact of disqualification were barred. No surer way could be devised to bring the processes of justice into disrepute.

As the passage itself indicates, the Court simply rejected the notion that specific questions directed at racial prejudice "were barred."[13] The Court did not purport to hold that specific questions directed to-

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[12] See also *United States* v. *Williams*, 612 F.2d 735, 736-737 (3d Cir. 1979), cert. denied, 445 U.S. 934 (1980); *United States* v. *Bowles*, 574 F.2d 970, 971-973 (8th Cir. 1978); *United States* v. *Robinson*, 485 F.2d 1157, 1158-1159 (3d Cir. 1973); *United States* v. *Powers*, 482 F.2d 941, 944 (8th Cir. 1973) (dictum).

[13] Indeed, most of the opinion is devoted to demonstrating that the trial judge had erred in holding that such inquiries were "improper." See *Aldridge* v. *United States*, *supra*, 283 U.S. at 311-313.

ward racial prejudice are required whenever requested by a defendant and without regard to the nature of the case. See, *e.g.*, *Ham* v. *South Carolina*, *supra*, 409 U.S. at 526; *United States* v. *Polk*, 550 F.2d 1265, 1267 (10th Cir.), cert. denied, 434 U.S. 838 (1977); *United States* v. *Perez-Martinez*, 525 F.2d 365, 366-368 (9th Cir. 1975); *United States* v. *Diggs*, 522 F.2d 1310, 1317-1319 (D.C. Cir. 1975), rehearing denied, 535 F.2d 1299 (1976); *United States* v. *Walker*, 491 F.2d 236, 239 (9th Cir.), cert. denied, 416 U.S. 990 (1974); see also *Ristaino* v. *Ross*, *supra*, 424 U.S. at 597 n.9. And, of course, the facts of *Aldridge*—a black defendant charged with murdering a white police officer—were quite likely to inflame racial passions and therefore afford no foothold for distilling from its holding any broad rule applicable to cases in which race appears to be a negligible factor.

Similarly, while the Court in *Ristaino*, another prosecution for a crime of interracial violence, stated that *voir dire* questioning directed to racial prejudice would have been required of a federal court "faced with the circumstances here" (424 U.S. at 597 n.9), that statement hardly supports a *per se* federal rule. Rather, like the decision in *Aldridge*, it simply indicates that when the particular circumstances of a case involve a high probability that racial bias could intrude into the jury's deliberations, some questioning of prospective jurors directed to racial bias will be required. Indeed, the discussion of the constitutional issue in *Ristaino* reflects some aversion to a *per se* rule (424 U.S. at 596 n.8):

> In our heterogeneous society policy as well as constitutional considerations militate against the divisive assumption—as a *per se* rule—that jus-

> tice in a court of law may turn upon the pigmentation of skin, the accident of birth, or the choice of religion. See *Connors* v. *United States*, 158 U.S. 408, 415 (1895).

A further intimation of the Court's uneasiness with a *per se* rule is its observation that the logic of such a rule is not limited to race but would apply with equal force whenever questioning about ethnic origin, religious affiliation, or national origin is requested (424 U.S. at 596 n.8).[14]

2. The Likelihood of Juror Bias Against Petitioner Because of His Mexican Ancestry Was Insufficient in the Circumstances of this Case to Require the Inquiry as a Matter of Federal Nonconstitutional Law

In *Aldridge*, the trial court failed to "ask any question which could be deemed to cover the subject" of racial bias (283 U.S. at 311). The defendant in *Aldridge* was a black man accused of murdering a white policeman. The penalty for the crime was death. On those facts (see *Ham* v. *South Carolina*, *supra*, 409 U.S. at 526), the Court held that the refusal to allow any question concerning racial prejudice was an abuse of discretion. The facts of *Aldridge* are so different from those of the instant case that it provides no support for petitioner's claim that the trial judge erred in refusing to ask a specific question concerning petitioner's "race or Mexican descent."

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[14] The list could no doubt be extended. For no matter what the particular bias or prejudice is, if it would prevent a juror from being fair and impartial the defendant arguably should be allowed to ask a specific question. Indeed, the more remote or farfetched the particular prejudice is, the greater is the arguable need for a specific question focusing the attention of prospective jurors.

In *Aldridge* the defendant faced the death penalty. This Court has often suggested that in such cases the trial judge's discretion is more narrowly confined than in cases in which the defendant's life is not at stake. See, *e.g.*, *Beck* v. *Alabama*, No. 78-6621 (June 20, 1980), slip op. 11-12. More importantly, interracial crimes of violence are significantly more likely to evoke racial hostility than the victimless crimes charged in this case, for at least two reasons. First, the fact that a case involves a defendant of one race and a victim of another may stimulate a kind of "us against them" attitude on the part of some jurors of the victim's race. Second, violent crimes are inherently more likely to evoke strong emotional reactions, thus increasing the danger that at least some of the jurors may be swayed by irrationality (*i.e.*, racism).[15] These considerations are not present here.

Moreover, unlike the trial court in *Aldridge*, the judge in this case inquired whether the nature of the crimes charged would affect any juror's impartiality (J.A. 18; Tr. 146-147), asked at least two questions that "could be deemed to cover the subject" (*Aldridge* v. *United States*, *supra*, 283 U.S. at 311) of bias against persons of Mexican descent, and emphasized the duty of the jurors to decide the case on the evidence presented at trial, "without regard to sympathy, prejudice[,] or passion for or against the defendant in this case" (Tr. 558; see *id.* at 587).

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[15] In addition to the victimless nature of the crimes charged in this case, petitioner's partnership with Bowling, "a white Anglo," makes it particularly unlikely that the jurors perceived petitioner's activities along strictly "racial" lines or regarded his ancestry as significant. Although Bowling testified, implicating petitioner in the smuggling operation, she also stated that he was a "nice person" and that she could not say anything "bad" about him (Tr. 407).

Compare *Ristaino* v. *Ross*, *supra*, 424 U.S. at 592-593 n.4.

The language of Fed. R. Crim. P. 24(a) specifically affirms the breadth of the district court's discretion as to the scope, content, and form of the questions posed as well as the manner of conducting the *voir dire* (emphasis added):

> The court *may permit* the defendant or his attorney and the attorney for the government to conduct the examination of prospective jurors *or may itself conduct the examination.* In the latter event the court shall permit the defendant or his attorney and the attorney for the government to supplement the examination by such further inquiry *as it deems proper or shall itself submit to the prospective jurors such additional questions by the parties or their attorneys as it deems proper.*

This Court has repeatedly commented on the broad discretion necessarily accorded trial judges in conducting jury *voir dire*:

> *Voir dire* "is conducted under the supervision of the court, and a great deal must, of necessity, be left to its sound discretion." *Connors* v. *United States*, 158 U.S. 408, 413 (1895); see *Ham*, *supra*, at 527-528; *Aldridge* v. *United States*, 283 U.S. 308, 310 (1931). This is so because the "determination of impartiality, in which demeanor plays such an important part, is particularly within the province of the trial judge." *Rideau* v. *Louisiana*, 373 U.S. 723, 733 (1963) (Clark, J., dissenting).

Ristaino v. *Ross*, *supra*, 424 U.S. at 594-595. Thus, unless it can be said that the district court abused

its discretion in failing to ask the specific question tendered by petitioner in light of the circumstances of this case, there was no error. See, *e.g.*, *United States* v. *Dennis*, 183 F.2d 201, 227-228 (2d Cir. 1950) (L. Hand, J.), aff'd, 341 U.S. 494 (1951).

For several reasons, we think it clear that there was no abuse of discretion in this case. First, petitioner suggests no reason for presuming that the general questions asked by the court were less likely to uncover prejudice against people of Mexican ancestry than his more specific question.[16] Indeed, it may be that the general questions asked by the court were more effective than the specific question suggested by petitioner would have been. As noted by Judge Moore, dissenting in *Ross* v. *Ristaino*, 508 F.2d 754, 759 (1st Cir. 1974), rev'd, 424 U.S. 589 (1976), "[f]ew jurors will reveal the innermost workings of their minds—particularly in public." [17]

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[16] Indeed, in support of the suggestion that this Court should "restructure" (Pet. Br. 20) the federal *voir dire* system, petitioner seems to assert that the sort of question approved in *Ham* v. *South Carolina*, *supra*, is "useless and ineffective" (*ibid.*). It is not clear why petitioner's question seven is not subject to the same characterization. Presumably, if each of the panel members had indicated that he or she would not "consider the race or Mexican descent of [petitioner] in * * * evaluat[ing] * * * [the] case," there would have been no reason to ask the open-ended second question.

[17] See generally Zeisel & Diamond, *The Effect of Peremptory Challenges on Jury and Verdict: An Experiment in a Federal District Court*, 30 Stan. L. Rev. 491, 531 (1978); Note, *Voir Dire: Establishing Minimum Standards to Facilitate the Exercise of Peremptory Challenges*, 27 Stan. L. Rev. 1493, 1503, 1506 nn.55-56, 1524 (1975); see also *United States* v. *Dennis*, *supra*, 183 F.2d at 227-228.

Fewer still are likely to profess their own racism in public. Here, the general questions asked allowed each juror to indicate his partiality, without being called upon to explain its basis or having it inferred from the nature of the question.

In any event, neither the facts of this case nor the nature of the charges against petitioner were such that petitioner's national origin is likely to have been significant. Indeed, petitioner seems to have accepted this view of the case at trial, since the only reason he adduced for asking his question seven was that *Aldridge* required the question simply because petitioner was of Mexican descent (see J.A. 25; Tr. 157).

Petitioner now argues (Br. 18) that because of the assertedly "racist" character of the Immigration Act, Bowling's status as a witness against him, his living arrangements with Bowling, and his relationship with Bowling's daughter, the trial court's refusal to ask the question tendered was contrary to the "guidelines established by this Court for federal courts." These factors are no more persuasive as reasons for requiring a specific question directed to the defendant's national origin under the federal common law rule than they are as reasons for requiring such a question as a matter of constitutional command. First, as noted above, petitioner failed to suggest any of these factors to the trial court as a basis for asking the question. Second, even if the trial court had been aware of the presently stated basis of petitioner's concern, none of these factors is so significant that nothing less than a specific inquiry could suffice. They are all quite peripheral to the issues that were before the jury, and surely none of them is as likely to invoke hostility or aggravate "latent racial antagonism" as

interracial violence (*ibid.*).[18] When the reasons for asking a specific question rather than a general one fairly covering the subject are no more compelling than those asserted here, the trial court's exercise of its discretion should be sustained.

3. *There Are No Compelling Reasons For This Court To Adopt A Per Se Rule In The Exercise of Quasi-Legislative Supervisory Power*

We have argued above that this Court's prior decisions do not establish any *per se* rule requiring questions about racial or national origin bias on *voir dire* whenever requested by the defendant in a criminal case. We have further contended that the circumstances of the present case are not sufficiently likely to provoke damaging bias against a defendant of Mexican descent to render the refusal to ask petitioner's proposed question an abuse of discretion under the federal common law rule. Even though there was no error in this case, the Court may wish to use the occasion, as some courts of appeal have done in similar cases,[19] to consider whether to exercise its supervisory

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[18] We recognize that testimony reflecting a romantic relationship between petitioner and Bowling's daughter touches upon an area where bias is quite prevalent. If that subject had been more material to the resolution of the issues at trial, a closer question might be presented. However, the matter appears to be pertinent only to the jury's assessment of Bowling's credibility (and only barely material even there), it was injected into the case by petitioner himself, and it was not called to the court's attention at the time of *voir dire*.

[19] See, *e.g.*, *United States* v. *Williams*, *supra*, 612 F.2d at 736; *United States* v. *Bowles*, *supra*, 574 F.2d at 971-973; *United States* v. *Robinson*, 466 F.2d 780 (7th Cir. 1972); *United States* v. *Carter*, *supra*; *United States* v. *Gore*, *supra*; *Frasier* v. *United States*, *supra*, 267 F.2d at 66.

powers over the administration of justice in the lower federal courts to announce a new *per se* rule (or, conversely, to disapprove the *per se* approach of some of the circuits).[20]

We preface our remarks on this subject by noting that we believe this kind of rule, whatever its wisdom, is well within the acknowledged and proper scope of the supervisory powers of a federal appellate court. At issue here is not a controversial attempt to utilize judicial supervisory power to oversee the comportment of the Executive Branch (compare *United States* v. *Jacobs*, 547 F.2d 772 (2d Cir. 1976), cert. dismissed, 436 U.S. 31 (1978)), but rather the regulation of the manner in which federal trial judges conduct trials. On the other hand, because the subject of juror *voir dire* is already addressed by Fed. R. Crim. P. 24(a), which confers broad discretion upon federal district judges and is arguably inconsistent with a *per se* rule, it may well be inappropriate to deal with the topic in a quasi-legislative fash-

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[20] Petitioner argues at length (Br. 19-27) that, in the exercise of its supervisory power, this Court should "restructure the judicial approach to *voir dire* in [the] federal courts" (*id.* at 20), "requir[ing] federal courts to permit *voir dire* by counsel for a period not to exceed 30 minutes each side and * * * the use of open-ended questions or techniques * * *" (*id.* at 27). That question is not fairly encompassed by the question on which this Court granted certiorari and therefore should not be considered. Sup. Ct. R. 21.1(a). Nor was the claim raised in the court of appeals. See *Lawn* v. *United States*, 355 U.S. 339, 362 n.16 (1958). In any event, the suggestion is patently insupportable since it would require this Court to invalidate Rule 24(a), Fed. R. Crim. P., on little more than policy considerations.

ion in a particular case. The Court may accordingly prefer to leave the matter for further consideration, if any is needed, through the rule amendment procedures. See 28 U.S.C. 331.

It is our view that neither the costs nor the benefits of a *per se* rule would be very substantial, but on balance it seems to us preferable not to adopt such an approach. The principal benefit we perceive in such a rule is that it might be somewhat less burdensome for the courts to administer than the present case-by-case approach. It may also be that the inquiry, if regularly made even in cases where there is no evident need for it, will occasionally bring to light a disqualifying juror bias, although we are skeptical about the efficacy of such specific questioning about bias. We reiterate in this connection our view that there is little basis for assuming that a venire member would be more likely to confess racism or bigotry in response to a specific question than in response to the potentially less embarrassing general questions of the type that were asked in this case.

On the other hand, the costs of adopting a *per se* rule are not likely to be substantial, so long as the questioning is kept simple and brief. But a series of questions designed to probe each prospective juror's racial attitudes "meaningfully" runs the danger of injecting racial issues in a case where they would otherwise play no role, and may also needlessly embarrass prospective jurors. In addition, a decision in this case to require questioning about national-origin bias will open the door to claims that the *per se* rule should embrace a host of other areas in which juror bias could potentially interfere with fair adjudication. These are the kinds of considerations that ap-

pear to have prompted the Court's rejection of a constitutional *per se* rule in *Ristaino* (424 U.S. at 596 n.8), and they have similar force with respect to a non-constitutional federal rule.

Should this Court elect to employ the instant case as a vehicle to announce a new *per se* rule requiring the district courts to inquire upon request into potential racial or national-origin bias, such a rule should be made wholly prospective in effect, and petitioner's conviction should not be reversed. The district court's refusal to make specific inquiry into the subject was fully in accordance with constitutional requirements and with the power conferred by Fed. R. Crim. P. 24(a). There has been no showing that petitioner's right to a fair trial was impaired, because the specific circumstances of his prosecution render it most unlikely that juror bias on account of his Mexican ancestry played any role in the verdicts. The purpose of the new rule would essentially be prophylactic, and it would be adopted in large part to serve interests of judicial convenience. Under such circumstances, reversal of his error-free conviction would be entirely inappropriate.

Although a litigant is generally given the benefit of a new rule established in his case, there is no jurisprudential necessity that a new rule invariably be applied in the case in which it is announced. Compare *Stovall* v. *Denno*, 388 U.S. 293, 301 (1967), with *England* v. *Louisiana State Board of Medical Examiners*, 375 U.S. 411 (1964); *James* v. *United States*, 366 U.S. 213 (1961). When the courts of appeals have announced broad new *per se* rules governing trial procedure, they have often given those

rules wholly prospective effect.[21] Such rules are essentially legislative and are only incidentally related to the facts of the cases in which they are announced; like legislation, they should apply only prospectively.

C. Even If Error Was Committed, It Does Not Support Reversal Of Petitioner's Convictions

Even if under the federal common law rule the district court should have asked petitioner's question seven, any error in its failure to do so in the circumstances of this case was harmless and does not justify reversal of petitioner's convictions. First, the questions that were asked of the prospective jurors regarding their attitudes toward aliens and the problem of illegal immigration were as likely as petitioner's question to be effective in rooting out actual or latent bias. Although petitioner correctly points out

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[21] See, *e.g.*, *United States* v. *Cornwell*, 625 F.2d 686, 688-689 (5th Cir. 1980) (hearing required prior to extension of probation); *United States* v. *James*, 590 F.2d 575 (5th Cir. 1979) (en banc) (procedure for determining admissibility of co-conspirator statements); *United States* v. *Garrett*, 574 F.2d 778 (3d Cir.), cert. denied, 436 U.S. 919 (1978) (*Mann* instruction disapproved); *United States* v. *Chiantese*, 560 F.2d 1244, 1255-1256 (5th Cir. 1977) (same); *United States* v. *Parker*, 549 F.2d 1217, 1224 (9th Cir.), cert. denied, 430 U.S. 971 (1977) (preservation of FBI rough notes for defendant's use in cross-examination); *Bryan* v. *United States*, 492 F.2d 775, 781 (5th Cir. 1974) (guilty plea procedures); *United States* v. *Silvern*, 484 F.2d 879, 882-883 (7th Cir. 1973) (*Allen* charge; ABA version adopted); *United States* v. *Foster*, 469 F.2d 1, 4-5 (1st Cir. 1972) (judicial inquiry required in cases of joint representation of co-defendants by single attorney); *United States* v. *Bush*, 416 F.2d 823, 826 (D.C. Cir. 1969) (malice instruction modified); *United States* v. *Fioravanti*, 412 F.2d 407 (3d Cir.), cert. denied, 396 U.S. 837 (1969) (*Allen* charge disapproved).

(Br. 17) that "alienage" is not the same as either "race or national origin," on the facts of this case it is a distinction without a difference.

The members of a venire from the Southern District of California are surely aware that California is bordered on the south by Mexico. Therefore, when the judge asked (J.A. 18; Tr. 146-147), "Do any of you have any particular feelings one way or the other about aliens or could you sit as a fair and impartial juror if you are called upon to do so," the jurors doubtless understood him to mean or, at the very least, include Mexican aliens. In reviewing the adequacy of the trial court's *voir dire*, this Court should read the questions asked as the venire probably understood them.[22]

Further, the name under which petitioner was indicted, Humberto Rosales-Lopez (but see note 2, *supra*), almost certainly suggested to each of the prospective jurors that petitioner was of Spanish descent. In addition, the trial judge introduced petitioner to the panel.[23] Therefore, when the trial court asked (J.A. 21; Tr. 151; emphasis added), "Does *any*

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[22] Petitioner's assertion (Br. 17-18) that the trial court's inquiries "tended to protect the Government's right to a fair trial by locating jurors who may have felt that laws penalizing poor people who come to the United States seeking only a place to work were unfair and unjust" is without any support in the record. Each of the court's questions in this area was broad enough to include any bias either for or against petitioner. The trial court wisely did not permit the two jurors who indicated bias to elaborate in open court, for fear of affecting the other venire members.

[23] Since petitioner was concerned that members of the panel might be biased against people of Mexican ancestry, it may be assumed that petitioner believed that either his name or his physical appearance was sufficient to indicate his Mexican ancestry.

reason occur to anyone of you why you could not sit in this case as a fair and impartial juror, *any reason whatsoever?*", the jurors presumably understood him to be referring at least in part to petitioner's apparent Mexican ancestry. See *Ross* v. *Ristaino*, 508 F.2d 754, 759-760 (1st Cir. 1974) (Moore, J., dissenting), rev'd, 424 U.S. 589 (1976); cf. *United States* v. *Peterson*, 483 F.2d 1222, 1227-1228 (D.C. Cir.), cert. denied, 414 U.S. 1007 (1973). The trial court also told the venire that the purpose of all of his questions was "to make sure that there are no underlying prejudices, there are no underlying reasons why you can't sit as * * * fair and impartial juror[s] if chosen to do so in this case" (J.A. 14; Tr. 142). In sum, there is no basis for speculation that the court's questioning was inadequate to identify and eliminate bias against persons of Mexican ancestry but that petitioner's proposed question would have been effective to that end.

In addition, the evidence against petitioner was overwhelming, thus virtually eliminating any possibility that the jury's verdicts were the product of undisclosed bias against him. Bowling and Falcon-Zavala, two of petitioner's co-venturers, testified at length concerning his role in the smuggling operation (Tr. 367-375, 424-435, 451-452). Each of the three illegal aliens who were smuggled across the border and to Los Angeles testified against petitioner (Tr. 248-288, 288-307, 313-335). It was petitioner who was at the garage waiting when the illegal aliens arrived (Tr. 255); it was petitioner who closed the trunk of the car used to transport the aliens to Los Angeles (Tr. 293, 322); it was petitioner who opened the trunk to let the guide out to drive the car after he and Bowling had exchanged cars (Tr. 258-259); it was petitioner who directed the three aliens to the

second floor apartment in Los Angeles (Tr. 327); and it was petitioner who went with one of the aliens to collect his $200 fee (Tr. 259-261). INS agents watched petitioner follow Bowling through the San Clemente checkpoint and turn off at Camino Real. The agents then saw petitioner riding in the car used to transport the aliens (Tr. 195-196), followed him to the Los Angeles apartment that they knew was a holding point for illegal aliens, saw him enter the apartment with the three aliens (Tr. 196), and arrested him as he went to collect his fee (Tr. 260-261).

This case involves at most a technical violation of a nonconstitutional prophylactic rule intended to provide limited additional protection for the defendant in securing a fair and impartial jury. The rule represents a policy judgment that in some cases a specific question concerning potential racial bias should be posed during *voir dire* in addition to whatever other questions are asked. If, in a particular case, the *voir dire* is sufficient to assure that the jury is in fact fair and impartial, thus effectively satisfying the purpose of the rule, the defendant has no legitimate basis for complaint, and the failure to ask the specific question provides no basis for reversal. Depending on all the surrounding circumstances, including the extent to which race or national origin is implicated by the facts of the case and the questions that were actually asked, the failure to ask a specific question in a particular case may often be wholly insignificant.[24]

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[24] In *Aldridge* the facts clearly implicated race and the district court asked no questions covering potential racial bias. There was, on those facts, no basis for finding harmless error since the likelihood of bias, in fact, was substantial. See also *Morford* v. *United States*, 339 U.S. 258 (1950), in

We acknowledge that when jury selection procedures systematically exclude identifiable groups of individuals from the pool of potential jurors, this Court has reversed the resulting judgment without inquiry as to actual prejudice. *E.g.*, *Duren* v. *Missouri*, 439 U.S. 357 (1979); *Taylor* v. *Louisiana*, 419 U.S. 522 (1975); *Peters* v. *Kiff*, 407 U.S. 493 (1972).[25] That is because, in such cases, the jury is constitutionally defective and therefore incompetent to return any verdict sufficient to support the deprivation of life, liberty, or property: "Due process requires a competent and impartial tribunal * * *." *Peters* v. *Kiff*, *supra*, 407 U.S. at 501; see *id.* at 505.[26] The claimed error in this case, however, does not affect the competence of the tribunal; nor is the asserted violation of the procedural rule involved in this case the sort of error that necessarily affects the entire

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which this Court reversed the conviction of the Executive Director of the National Council of American-Soviet Friendship, Inc., because the trial court refused to allow the defendant to question "prospective government employee jurors * * * with specific reference to the possible influence of the 'Loyalty Order,' * * * on their ability to render a just and impartial verdict." *Id.* at 259. In *Morford* as in *Aldridge* there was a substantial likelihood that the jurors were not impartial in fact.

[25] See also *Castaneda* v. *Partida*, 430 U.S. 482 (1977); *Hernandez* v. *Texas*, 347 U.S. 475 (1954); *Thiel* v. *Southern Pacific Co.*, 328 U.S. 217 (1946); *Strauder* v. *West Virginia*, 100 U.S. 303 (1879).

[26] *Tumey* v. *Ohio*, 273 U.S. 510 (1927), of course, also rests on this principle. For if a judge has a financial interest in the outcome of the litigation, he is incompetent and his judgment necessarily invalid without regard to whether he is actually influenced by his financial interest. See *id.* at 522, 532, 535.

proceedings.[27] Therefore, assuming that on the facts of this case the failure to ask the specific question tendered was error, it is nevertheless appropriate to consider whether petitioner suffered any substantial prejudice to his rights and to decline to reverse his conviction if none is shown. See, *e.g.*, *United States* v. *Johnson*, 527 F.2d 1104, 1106-1107 (4th Cir. 1975); *United States* v. *Grant*, 494 F.2d 120 (2d Cir.), cert. denied, 419 U.S. 849 (1974).[28]

Petitioner erroneously states (Br. 19 n.30) that "[i]n *Swain* v. *Alabama*, 380 U.S. 202, 219 (1965), this Court held: 'The denial or impairment of the right [to probe on *voir dire*] is reversible error without a showing of prejudice [citations omitted.].' " The material in brackets was added by petitioner. In *Swain* this Court held (1) that the evidence in the record was insufficient to establish a *prima facie* case of purposeful discrimination in the selection of jurors and (2) that the allegation that the county prosecutor peremptorily struck all black members of the venire was insufficient to support a motion to strike the entire jury. As is clear from the full context of the sentence quoted in petitioner's brief and the omitted citations, the Court was considering the right to exercise peremptory challenges and not any "right to

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[27] Compare the denial of a defendant's right to counsel, which is a systemic error affecting the validity of the proceedings and requiring reversal without inquiry as to actual prejudice. See *Gideon* v. *Wainwright*, 372 U.S. 335 (1963).

[28] In *Peters* v. *Kiff*, *supra*, the Court held that a white defendant could challenge the systematic exclusion of blacks from the pool of prospective grand and petit jurors. As noted in the text, any jury selected from such a pool is incompetent, and therefore *Peters* provides no support for petitioner's assertion (Br. 19) that failure to ask a specific question in violation of the federal common law rule is necessarily reversible error.

probe on *voir dire*." The passage from *Swain* accordingly could not mean that the denial or impairment of the latter "right" is always reversible error. Indeed, this Court's holdings in *Ham* and *Ristaino* [29] plainly imply that there is no such right.[30]

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

ANDREW L. FREY
Deputy Solicitor General

GEORGE W. JONES
Assistant to the Solicitor General

JOHN F. DEPUE
Attorney

DECEMBER 1980

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[29] In *Ham*, the Court observed that "either of the brief, general questions" suggested by the accused in that case would have been sufficient (409 U.S. at 527). In *Ristaino* v. *Ross*, *supra*, this Court held that the defendant had no "right" to ask even one question specifically directed to potential racial prejudice.

[30] Those courts of appeals that have held the refusal to ask a specific question focusing on the defendant's race or national origin to be automatic reversible error, without considering the questions that were asked, the likelihood of harm to the accused, and the facts of the particular case, see, *e.g.*, *United States* v. *Bowles*, *supra*, 574 F.2d at 971-973, have ignored both the language of Fed. R. Crim. P. 52(a) and society's interest in a reasonably efficient system of criminal justice.

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No. 79-6624

IN THE

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OCTOBER TERM, 1980

HUMBERTO ROSALES-LOPEZ,

PETITIONER,

v.

UNITED STATES OF AMERICA,

RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF OF THE PETITIONER

JOHN J. CLEARY
Federal Defenders of San Diego, Inc.
225 Broadway, Suite 855
San Diego, California 92101
(714) 234-8467
FTS 895-5240

Court-appointed Counsel for Petitioner

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STATEMENT

The relationship of the Petitioner, a Mexican, to the daughter of Virginia Bowling, a Caucasian [R.T. 170] was first raised in the trial during the opening statement of Government counsel who stated that the Petitioner lived with Ms. Bowling and "was the boyfriend of Ms. Bowling's daughter." [R.T. 165]. During the Government's opening statement reference was also made to "a piece of paper with the words, 'I love you, Chuy,'

and when asked who Chuy [1] was, Mrs. Bowling stated it was her daughter's husband." [R.T. 174-175].

The first testimony touching upon the relationship of the Petitioner was first solicited by Government counsel who had Ms. Virginia Bowling state that the Petitioner was dating her daughter and living at her house. [R.T. 360] [2]

ARGUMENT

A. The error was of constitutional magnitude.

Aldridge v. United States, 283 U.S. 308 (1931) held that the trial judge's discretion concerning voir dire is "subject to the essential demands of fairness." 233 U.S. 305, 310. [3]

The decisions of Aldridge and Ham v. South Carolina, 409 U.S. 524 (1973), established on either constitutional due process (Fifth Amendment) or right to an impartial jury (Sixth Amendment), call for reversal in light of the potential prejudice against a Mexican in the context of this criminal case.

This case should be decided on a constitutional basis, because the error is so egregious and the remedy (mandatory inquiry as to racial bias) so simple. Because this is a federal criminal case, the Court may prefer to decide the issue based upon the requirements of federal criminal practice (as distinct from federal review of state criminal proceedings) so

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1/ A reference to the Petitioner. [R.T. 360, App. 28].

2/ The relationship between the Mexican Petitioner and the Caucasian daughter of the Government's witness Bowling (unindicted co-defendant) explained the Petitioner's presence at the Bowling residence and was not an example of "invited error." Cf. Govt. Br. 12 n.8.

3/ The phraseology is the equivalent of constitutional due process, but Aldridge's brief to this Court (p. 3) placed reliance upon the right of the accused to have an impartial jury under the Constitution of the United States (Amendment VI).

as not to reach the constitutional issue. Cf. Almeida-Sanchez v. United States, 413 U.S. 266, 272 (1973); Stern and Gressman, Supreme Court Practice, 286 (5th ed. 1975).

B. The failure to make specific inquiry as to racial prejudice was error under federal law.

1. Federal law for almost 50 years has required inquiry when requested as to potential race or national origin bias.

In 1931 Aldridge stated the rule for federal courts. The limitations of Ristaino v. Ross arise out of the reluctance of federal courts to review the criminal procedure of state courts unless constitutionally mandated, as in Ham v. South Carolina.

If the case is to be decided on a non-constitutional basis, it would be inappropriate to attempt to distinguish, as the Government suggests (Govt. Br. 10, 17-18), the well-established precedent of Aldridge on the factual circumstances of that and subsequent cases. Strange anomalies would result, for it makes no difference to the fairness of a trial whether the accused is charged with a capital crime (Aldridge) or a non-violent victimless offense (Ham). The potential of racial prejudice taints any conviction. This court has not yet undermined Aldridge, and it should not start now.

2. The likelihood of juror bias against the Petitioner because of his Mexican ancestry required inquiry.

The term voir dire is literally defined "to speak the truth." 4/ The questioning procedure is directed to persons under oath with the hope that the potential jurors will indicate the possible bases for challenge. Questioning is directed to stimulate an informational response from the jurors, but the six-minute litany of rhetorical questions

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4/ Black's Law Dictionary, 1412 (5th Ed. 1979).

propounded by the district court in this case manifests the need to enforce the mandate of Aldridge. The Petitioner was Mexican, and the relationship with Mrs. Bowling and her daughter could easily evoke unfounded and irrational juror prejudices against him. Defense counsel recognized the obvious detrimental potential for his client and specifically requested in writing that a single question concerning race be asked. Counsel again requested that the question be asked when not covered by the court's brief voir dire.

In Aldridge, Chief Justice Hughes quoted from People v. Reyes, an early California case supporting the need for an inquiry:

> "Prejudice being a state of mind more frequently founded in passion than in reason, may exist with or without cause; and to ask a person whether he is prejudiced or not against a party, and, if the answer is affirmative, whether that prejudice is of such a character as would lead him to deny the party a fair trial, is not only the simplest method of ascertaining the state of his mind, but is, probably, the only sure method of fathoming his thoughts and feelings." 283 U.S. 308, 313 n.3.

Modern psychology teaches that it is best for the prospective juror, not counsel, to have the principal role in speaking during voir dire so that counsel may determine if this fundamental bias may exist. Once a witness has spoken, counsel may determine that the bias exists even though the juror himself may be unaware of it. To suggest, as does the Government (Govt. Br. 20-21), that some prospective jurors will fail to adhere to their oath and respond honestly to questions probing race bias and that this act or perjury by veniremen justifies no inquiry on race is absurd. Such logic challenges the integrity of our judicial system.

The Government's argument (Govt. Br. 21) that counsel failed to suggest any factual basis for his proposed question concerning race bias is not well founded. The reasoning at the sidebar conference in support of this proposed

voir dire question expressly referred to and incorporated by reference Aldridge which would include the reasons given by Chief Justice Hughes for asking this question. The Petitioner's Mexican appearance was obvious, and the case charged alien smuggling. 5/

Prepared trial counsel know the critical issues of their cases, and, given the nature of extremely restrictive voir dire in federal courts, tailor their proposed questions to the areas that will disclose the most serious bias or prejudice. Here, the defense deemed race an essential question in the context of this case, but the district court did not. In Aldridge, the conviction was reversed even though a specific voir dire question on racist prejudice had not been proposed by the defense as was done here. Here, not only was there a specific question but also a named reference (i.e. Aldridge) to the controlling precedent of this Court was presented to the trial court, but they were rejected.

3. This court is not adopting a new rule or exercising quasi-legislative power.

In Aldridge this court established a per se rule:

> We are of the opinion that the ruling of the trial court on the voir dire was erroneous, and the judgment of conviction must for this reason be reversed." 283 U.S. 308, 315 (Emphasis added).

The Government acknowledges that the jury selection procedure that would systematically exclude identifiable minorities would result in a reversal without inquiry as to actual prejudice (Govt. Br. 30). No matter how intensive voir dire seeks to eliminate racial prejudice in the jurors selected, the established per se rule requires reversal. Failure to inquire

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5/ The visiting judge from the District of Columbia who did not hear the pretrial evidentiary motions prior to trial was both unfamiliar with the facts of the case and the locale. Long distance evaluation by Government counsel as to the attitudes of the San Diego jurors toward a Mexican defendant is little more than speculation.

of prospective jurors as to racial prejudice portends even greater harm to the impartiality of the tribunal (jury), and for the greater harm this Court should not fashion a lesser remedy.

Even if the Court does not choose to follow the per se rule of Aldridge, the Mexican Petitioner's living and involvement with both Mrs. Bowling and her daughter, both Caucasians, is sufficient to indicate that the error is not harmless beyond a reasonable doubt. Chapman v. Califoria, 386 U.S. 18 (1967). The Government's contention that "the evidence against the petitioner was overwhelming" (Govt. Br. 28) does not fairly evaluate the merits of the defense but more importantly usurps the evaluative function of the jury to weigh credibility and demeanor of the witnesses. The three material witnesses (illegal aliens) never identified the guide and had been given Government immunity for their testimony. (R.T. 344-346, 351). The other two Government witnesses, Bowling and Falcon-Zavala, also co-defendants, had been promised recommendations of leniency that resulted in probationary sentences. The jury had to accept the credibility of all five of these witnesses to convict the Petitioner, and that determination, which could have been influenced by racial prejudice against the Petitioner, must not stand.

The Court is not acting in a legislative capacity when it implements the Sixth Amendment requirement of an impartial jury in the context of a federal criminal case. It is the function of this Court to set forth clearly identifiable guidelines that will insure adequate inquiry and effective exploration for racial prejudice in federal jury panels.

The government contends that Petitioner's suggestion that a presumptive requirement of permitting both sides upon request to conduct personal voir dire not to exceed 30 minutes is beyond the question presented. (Govt. Br. 23 n. 20). The

issue as part of the defense effort to obtain voir dire is before the court. [6] This court, in the exercise of its supervisory power, should formulate and promulgate objective criteria for inquiry about racial prejudice. Surely the Government's resort to the limitless discretion of Rule 24 of the Federal Rules of Criminal Procedure is no answer.

The Government's total reliance on Ham and Ristaino is misplaced as they are state cases and inapposite. A formula question, even the example proposed by the Petitioner in the instant case, is no final litmus that would fit the facts of every future federal criminal case. In some cases, experienced counsel might prefer to have the judge make the inquiry as to this sensitive topic if counsel sought such inquiry.[7] In federal courts, the role of the advocate in voir dire has been almost obliterated by the unfettered and "standardless discretion"[8] of the trial judge. In an attempt to balance the needs of efficient court management (i.e. avoid argumentative, didactic, and protracted voir dire) against the fundamental right to have adequate inquiry as a predicate to the exercise of challenges, Petitioner urges that this court require that federal district court judges presumptively grant the request by counsel to personally (orally) participate in voir dire for a short time, 30 minutes per side (approximately one minute per prospective juror in the panel). The counsel

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6/ The record in this case contains an affirmative defense request for 30 minutes voir dire personally by counsel as well a proposed open-ended question concerning racial prejudice. (C.R. 11-1; App. 9).

7/ The right of inquiry does not necessarily mean counsel would exercise in every case, but the trial court's role should be sensitive to reasonable and limited requests of counsel during voir dire.

8/ United States v. Payner, 100 S.Ct. 2439, 2445 (1980). This court refused to recognize a limitless discretion of the district, for to do so, "we would confer on the judiciary discretionary power to disregard the considered limitations of the law it is charged with enforcing." 100 S.Ct. 2439, 2447.

would have this limited opportunity to probe on points deemed essential in light of the anticipated evidence. The court would still have the right to restrict inquiry to avoid abuse, and this Court could also suggest that district courts first explain and instruct the jury on the purposes and procedure of selection. At the present time, counsel is practically excluded from voir dire in federal courts and, as demonstrated by this case, that surface inquiry may easily fail to detect serious prejudice. Jury questioning must also be adapted to the responses given, and all questions may not be preordained before trial. Admittedly, inquiry as to racial prejudice is a delicate matter, but it is an inquiry in which counsel, if he or she chooses, should be an active participant. In this case, if counsel had been allowed to briefly question, the ensuing appellate litigation may have been avoided.

C. The error was not cured by the other questions asked.

Not only the questions asked but the duration and scope is pertinent to adequacy of the voir dire. The abbreviated style of jury selection was not designed to elicit any information from the prospective jurors that would have permitted the intellegent exercise of challenges for cause or peremptory challenges. The court did ask one of the defense requested instructions concerning the jurors' attitude toward the "alien problem" and "aliens" but failed to relate or connect it to the Petitioner. Many concepts such as economic exploitation of aliens, the unfairness of the immigration laws, the disadvantaged seeking a better life, the criminal offense itself, as well as status lacking the benefits of citizenship are included within the broad term "alien," but the court failed to direct the specifically requested inquiry as to their attitude toward the Petitioner's race or descent. The "alien"

question is deficient for it fails to identify or expose racial prejudice. It is also too broad, similar to a general question as to a lack of any bais or prejudice, and also fails to detect a specific basis as to the critical issue of racial prejudice. This is especially true in this case involving the illegal transportation of undocumented aliens, because the sole juror's response concerned the business of smuggling rather than racial or ethnic prejudice. Thus, prospective juror Rosa, in response to the court's general question concerning "aliens" stated: "It is just a name that they use for the people to transport illegal aliens and to place them intentionally--." (R.T. 146; App. 17) This response had nothing to do with racial prejudice toward the defendant.

The insidious and pervasive influence of racism, often not consciously admitted by its possessor, should not be considered probed by a misdirected and ambiguous general question. The voir dire never confronted or covered the potential of racial prejudice against the Petitioner.

CONCLUSION

Measured either by a constitutional standard or procedural supervision of federal courts, the refusal to present the question concerning racial prejudice was reversible error. For the reasons set forth in the opening brief and this reply brief, it is requested that the judgment of the Court of Appeals be reversed.

Respectfully submitted

2 JANUARY 1991

JOHN J. CLEARY
Federal Defenders of San Diego, Inc.
225 Broadway, Suite 855
San Diego, California 92101
(714) 234-8467
FTS 895-5240

Court-appointed Counsel for
Petitioner